not suffering from seizure activity when he killed Brenna Bailey. (*Id.* at 87-88.)

Dr. Tatro testified concerning his opinion that Summerlin suffered from organic brain syndrome and emphasized Summerlin's significantly impaired capacity to control his behavior. (*Id.* at 68-74.)

Although Summerlin testified at the hearing, he did not volunteer, nor did his post-conviction relief counsel question him about, information relating to electroshock treatments or being locked in a room with ammonia fumes.

At the conclusion of the evidentiary hearing, Judge Marquardt found that Summerlin had failed to demonstrate "a reasonable probability" of a different result based on the allegations of counsel's ineffectiveness. (Appendix C, at 3.) The Arizona Supreme Court denied Summerlin's petition for review from that ruling.

The Ninth Circuit's Failure to Accord Deference

Twenty years after the state post-conviction proceedings, in concluding there was a reasonable probability that Summerlin's sentence would have been different absent the alleged deficient performance by counsel, the Ninth Circuit essentially ignored the trial judge's express holding that the alleged deficient performance did *not* affect Summerlin's sentence.

Furthermore, in finding prejudice, the Ninth Circuit misapplied Arizona law. The Ninth Circuit found that alleged deficiencies in presenting mitigation evidence were particularly significant because evidence of the "especially heinous, cruel, or depraved aggravator" under A.R.S. § 13-703(F)(6) "was not particularly strong." The court based this finding on its assumption that "proof of premeditation is especially important in determining whether the statutory aggravator had been proven beyond a reasonable doubt." (Appendix A, at 31.) However, the Arizona Supreme Court has made clear that proof of premeditation is not required to establish the heinous, cruel, or depraved aggravator, *see Summerlin*, 675 P.2d at 696, and that interpretation is binding on the federal courts. *See Bradshaw v. Richey*, 546 U.S. ___, 126 S. Ct. 602, 604 (2005) (per

curiam) (noting that "a state court's interpretation of state law, including one announced on direct appeal of the challenged *conviction, binds a federal court sitting in habeas corpus*").

The Ninth Circuit's ruling that Summerlin has satisfied the prejudice prong of the *Strickland* analysis is unsupportable. The trial court's finding that any alleged deficiencies in the presentation of mitigation evidence did not affect the sentence imposed definitively answers the question of whether Summerlin established prejudice under *Strickland*. The trial judge had an opportunity to consider what he would have done had the information at issue been presented at the time of sentencing. and the trial j dge stated that it would not have made a difference in his sentencing decision.

Failure to accord deference on federal review to state court rulings regarding the prejudice prong of the *Strickland* analysis undermines the states' interest in the finality of their judgments in criminal cases. Federal habeas review at the circuit court level often occurs more than a decade after the original sentencing. As in the instant case, the federal appellate court is far removed from the original proceeding and it is difficult, if not impossible, for it to have the same perspective as the original sentencer.

The Ninth Circuit's lack of deference in assessing the prejudice prong of the *Strickland* analysis is not unique to this case, and affects at least 70 Arizona capital cases (including 9 pre-AEDPA cases) that are currently pending in federal court, as well cases from other states with similar sentencing and post-conviction procedures. That lack of deference defeats the states' interest in finality and undermines confidence in the criminal justice system.

The Ninth Circuit's recent record in addressing the prejudice prong of the *Strickland* analysis demonstrates why public confidence in the criminal justice system is undermined when federal courts do not accord deference to state court rulings. Since 1998, the Ninth Circuit has granted habeas relief in 5 Arizona capital cases on the basis of ineffective assistance of counsel at sentencing. *See Lambright v. Stewart*, 241 F.3d 1201 (9th Cir. 2001) (remanded for an evidentiary hearing); *Smith (Joe Clarence) v. Stewart*, 189 F.3d 1004

(9th Cir. 1999) (remanded for a new sentencing); *Wallace v. Stewart*, 184 F.3d 112 (9th Cir. 1999) (remanded for a new sentencing); *Smith (Bernard) v. Stewart*, 140 F.3d 1263 (9th Cir. 1998) (remanded for a new sentencing); *Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998) (remanded for an evidentiary hearing).

Proceedings subsequent to the Ninth Circuit reversals in all of these cases have resulted in rulings upholding the death sentence following an evidentiary hearing or resentencings where death has again been imposed.[3] These five defendants had originally been sentenced to death in the 1970s or 1980s. Relitigating these cases on remand took a total of over 15 years, from about 3 to 6 years for each of the cases, exacting a toll on victims and consuming limited criminal justice resources. And, in the three cases in which there has been a resentencing, the lengthy appeals process starts anew.

If left unchanged, the Ninth Circuit's ruling in this case will result in a new sentencing proceeding in state court that will similarly

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3.

In August 2004, following an evidentiary hearing in district court, the court denied Lambright's ineffectiveness at sentencing claim. (Dkt. 325; https://ecf.azd.uscourts.gov/cgi-bin/DktRpt.pl?123647959341114-L_280_0-1) Lambright was originally sentenced to death in May 1982.

In June 2004, a jury re-imposed Joe Clarence Smith's two death sentences. http://www.superiorcourt.maricopa.gov/docket/criminal/caseInfo.asp (CR0000-095116). Smith was originally sentenced to death in August 1977 for both murders, an 18-year-old girl murdered in December 1975 and a 14-year-old girl murdered in January 1976.

In April 2005, a jury re-imposed Wallace's three death sentences. http://www.cosc.co.pima.az.us/courtpartners/start.asp. (CR-12590). Wallace was originally sentenced May 1985, following his guilty plea to murdering two children and their mother.

In March 2003, following an evidentiary hearing, the district court denied Correll's ineffective assistance at sentencing claim. (Dkt. 439, https://ecf.azd.uscourts.gov/cgi-bin/DktRpt.pl?111478375068962-L_280_0-1. Correll was originally sentenced to death for his triple murders in November 1984.

restart the lengthy appeals process, and will similarly exact an unwarranted toll on victims and the criminal justice system. The Ninth Circuit's ruling that there is a reasonable probability Summerlin would not have been sentenced to death is clearly erroneous and should be reversed by this Court.

CONCLUSION

This case is an extreme example of a failure to accord deference to factual findings by a state court. The same state court judge who sentenced Summerlin also addressed and rejected Summerlin's ineffective assistance of counsel claim, finding that the alleged deficient performance did not affect Summerlin's sentence. Thus, there is no need to speculate regarding whether Summerlin has established prejudice under *Strickland*. Accordingly, and based on the foregoing authorities and arguments, Petitioners respectfully request this Court to grant the petition for writ of certiorari.

Respectfully submitted,

TERRY GODDARD
Attorney General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section
(Counsel of Record)
Attorneys for PETITIONER

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Warren Wesley Summerlin, *Petitioner-Appellant*, v. Dora B. Schriro, Director of Arizona Department of Corrections, *Respondent-Appellee*.	)	No. 98-99002 D.C. No. CV-86-00584-ROS OPINION

On Remand from the United States Supreme Court

Argued and Submitted
March 22, 2005—San Francisco, California

Filed October 17, 2005

Before: Mary M. Schroeder, Chief Judge, and Harry Pregerson, Stephen Reinhardt, Diarmuid F. O'Scannlain, Michael Daly Hawkins Sidney R. Thomas, M. Margaret McKeown, Kim McLane Wardlaw, William A. Fletcher, Raymond C. Fisher, and Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge Thomas:
Partial Concurrence and Partial Dissent by
Judge O'Scannlain

petition for a write of habeas corpus in federal district court, which was denied.

Summerlin appealed, and the court of appeals reversed in part and remanded the case for an evidentiary hearing to determine the sentencing judge was competent when he was deliberating on whether to impose the death penalty. In the meantime, the Supreme Court issued its decision in *Ring v. Arizona*, 536 U.S. 584 (2002), determining that Arizona's capital sentencing scheme violated the Sixth Amendment because the penalty of death was imposed by a judge, rather than a jury. The court of appeals then reheard the case *en banc* and upheld Summerlin's conviction, but also held that *Ring* applied retroactively so as to require that the penalty of death imposed upon Summerlin be vacated (*Summerlin I*). The Supreme Court reversed, holding that *Ring* did not apply retroactively to cases already final on direct review. The Court remanded the remaining sentencing issues, including whether Summerlin received ineffective assistance of counsel during sentencing.

[1] The Sixth Amendment right to counsel in a criminal trial includes the right to the effective assistance of counsel. This right extends to all critical stages of the criminal process, including capital sentencing. **[2]** The proper measure of attorney performance is simply reasonableness under prevailing professional norms. **[3]** A criminal defense attorney has a duty to investigate, develop, and present mitigation evidence during penalty phase proceedings. **[4]** During penalty phase proceedings, counsel has a duty to make a diligent investigation into his client's troubling background and unique personal circumstances. **[5]** To that end, the investigation should include inquiries into social background and evidence of family abuse, mental impairment, and physical health history, particularly for evidence of potential organic brain damage and other disorders. **[6]** The defendant's history of drug and alcohol abuse should also be investigated, and defense counsel needs to meet with his client to discuss the preparation of the penalty phase defense. **[7]** Summerlin's attorney failed to investigate the available evidence concerning possible mental health mitigation either prior to the guilt phase trial or the penalty phase hearing, clearly missing critical mitigation evidence. Where counsel is

on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as a mitigating factor in a penalty phase hearing, without a supporting strategic reason, constitutes deficient performance. [8] Failure to review evidence that the attorney knows the state will produce at a penalty phase trial falls below an objective standard of reasonableness for performance in preparing for a penalty phase defense. [9] The failure of Summerlin's attorney to investigate evidence the state planned to introduce at the penalty phase trial constituted constitutionally deficient performance.

[10] Adequate consultation between attorney and client is an essential element of competent representation of a criminal defendant. [11] Summerlin's penalty phase counsel did not conduct any independent investigation, not even consulting with his client. His failure to investigate falls far short of any objectively reasonable standard against which we might measure attorney performance under the standards of the Sixth Amendment.

[12] Failure to present mitigating evidence at the penalty phase of a capital case constitutes ineffective assistance of counsel. [13] Summerlin's penalty phase attorney knew of essential mitigating evidence concerning the aggravating factor, but did not present this mitigation evidence at the penalty phase. [14] This failure fell below the objective standards of reasonableness for attorney conduct in a penalty phase trial. Summerlin did not have the effective assistance of counsel at his penalty phase guaranteed by the Sixth Amendment.

[15] Summerlin's objection to the presentation of the psychologist was no indication that he was instructing his attorney not to present any mitigating evidence. [16] However, even if Summerlin had instructed counsel not to present a mitigation defense, counsel had already demonstrated ineffectiveness by failing to thoroughly investigate the existence of mitigating factors. [17] A lawyer's duty to investigate is virtually absolute, regardless of a client's expressed wishes. [18] Summerlin's apparent objection could not serve to excuse his attorney's failure to present mitigating evidence at the penalty phase hearing.

[19] To justify habeas relief, Summerlin had to also show that he was prejudiced by the ineffective assistance. **[20]** The failure to present a mitigation defense all but assured the imposition of a death sentence under Arizona law at the time. **[21]** This was not a clear-cut death penalty case. **[22]** A measure of assessing prejudice in a capital penalty phase proceeding is to reweigh the evidence in aggravation against the totality of available mitigating evidence. **[23]** When considered in the aggregate, the available mitigating evidence was far more compelling than the evidence the Supreme Court has held adequate to establish prejudice. Had an adequate mitigation defense been presented, there was a reasonable probability that an objective sentencing factfinder would have struck a different balance. It had to be held that Summerlin established prejudice. **[24]** The district court's denial of a writ of habeas corpus as to the penalty phase had to be reversed.

Judge O'Scannlain concurred in part, and dissented in part, agreeing with that portion of the court's opinion that held that counsel's failure to investigate mitigating evidence constitutes constitutionally deficient performance, but disagreeing with the court's conclusion that the state court's affirmance of the death penalty violated constitutional standards.

COUNSEL

Ken Murray and Leticia Marquez, Federal Public Defender's Office, Phoenix, Arizona, for the petitioner-appellant.

John Pressley Todd, Attorney General's Office, Phoenix, Arizona, for the respondent-appellee.

OPINION

THOMAS, Circuit Judge:

In this appeal we consider whether petitioner received ineffective assistance of counsel at the penalty phase of his capital murder trial.

We conclude that he did and reverse the judgment of the district court denying a writ of habeas corpus

I

Extraordinary plot lines rarely end; they frequently reappear in sequels. Thus, this case returns to us from the Supreme Court for us to write the next chapter in this unusual saga.

We need not recount the prior episodes in detail; the underlying factual and procedural history is chronicled in our prior opinion. *Summerlin v. Stewart ("Summerlin I")*, 341 F.3d 1082, 1084-92 (9th Cir. 2003)(en banc). In brief, Warren Summerlin was convicted of the murder of Brenna Bailey by a jury and was sentenced to death by a state judge. The Supreme Court of Arizona reviewed and affirmed Summerlin's convictions and his sentence. *See State v. Summerlin*, 675 P.2d 686 (Ariz. 1983), *recons. denied* Jan. 17, 1984. After an initial petition for writ of habeas corpus in federal district court and four unsuccessful post-conviction attempts in state court to overturn his conviction, Summerlin filed a second amended petition for writ of habeas corpus in the federal district court in Arizona on November 22, 1995. *See* 28 U.S.C. § 2254 (1994). The federal district court denied Summerlin's second amended petition for writ of habeas corpus on October 31, 1997. Pursuant to Fed. R. Civ. P.59(e), Summerlin moved to vacate the judgment on November 28, 1997. The district court denied this motion on January 12, 1998, but issued a certificate of probable cause enabling Summerlin to appeal pursuant to Fed. R. App. P. 22(b)(1). This timely appeal followed.

A divided three-judge panel of this Court issued its opinion on October 12, 2001, affirming the district court in part and reversing in part. *See Summerlin v. Stewart*, 267 F.3d 926 (9th Cir. 2001), *withdrawn*, 281 F.3d 836 (2002). The case was remanded for an evidentiary hearing as to whether the state trial judge was competent when he was deliberating on whether to impose the death penalty. *Id.* at 957.

In the interim, before the mandate issued in the appeal, the United States Supreme Court held that Arizona's death penalty statute violated the Sixth Amendment because the penalty of death was imposed by a judge, rather than a jury, *Ring v. Arizona*, 536 U.S. 584, 609 (2002). We granted rehearing *en banc* to consider, *inter alia*, the potential retroactive effect of *Ring*. After rehearing *en banc*, we upheld Summerlin's conviction, but also held that *Ring* applied retroactively so as to require that the penalty of death imposed upon Summerlin be vacated. *Summerlin I*, 341 F.3d at 1121. The Supreme Court granted a writ of certiorari in part, *Schriro v. Summerlin*, 540 U.S. 1045 (2003), and reversed *Summerlin I*, holding that *Ring* did not apply retroactively to cases already final on direct review. *Schriro v. Summerlin*, 124 S.Ct. 2519, 2526 (2004). The Court remanded the remaining sentencing issues, namely:

1. Whether Summerlin received ineffective assistance of counsel during the sentencing phase of his capital trial in violation of his rights under the Sixth Amendment;

2. Whether Summerlin's court-appointed public defender had a conflict of interest that adversely affected her representation at a critical stage of the proceedings, in violation of his rights under the Sixth Amendment;

3. Whether Summerlin was deprived of his right to due process of law because the trial judge was addicted to marijuana during his trial and deliberated over his sentence while under the influence of marijuana; and

4. Whether cumulative errors require reversal of his sentence.

Because the petition for a writ of habeas corpus was filed before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), pre-AEDPA law governs our consideration of the merits of the claims. *Lindh v. Murphy*, 521 U.S. 320, 327 (1997); *Jeffries v. Wood*, 114 F.3d 1484,

1494 (9th Cir. 1997) (en banc). Under pre-AEDPA law, we consider a claim alleging ineffective assistance of counsel as a mixed question of law and fact that we review *de novo*, *Rios v. Rocha*, 299 F.3d 796, 799 n.4 (9th Cir. 2002). We review the district court's denial of Summerlin's habeas petition *de novo* and the district court's factual findings for clear error. *Id.* Because this is a pre-AEDPA case, we do not review the state court's legal conclusions to determine whether they are "objectively unreasonable;" rather, we "simply resolve the legal issue on the merits, under the ordinary rules." *Belmontes v. Brown*, 2005 WL 1653620, *1 (9th Cir. July 15, 2005); *see also id.* (" '[A]n unreasonable application of federal law is different from an incorrect application of federal law.' " (quoting *Williams v. Taylor*, 529 U.S. 362, 365 (2000) (plurality opinion)). We owe less deference to state court factual findings under pre-AEDPA law, but "we must still presume such findings to be correct unless they are 'not fairly supported by the record.' " *Bean v. Calderon*, 163 F.3d 1073, 1087 (9th Cir. 1998) (quoting 28 U.S.C. § 2254(d)(8) (1996)).

II

The first sentencing issue is whether Summerlin received constitutionally effective assistance of counsel at sentencing. We conclude that he did not, requiring reversal of the district court order denying the petition for a writ of habeas corpus.

A

[1] The Sixth Amendment right to counsel in a criminal trial includes "the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). This right extends to "all critical stages of the criminal process," *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004), including capital sentencing, *Silva v. Woodford*, 279 F.3d 825, 836 (9th Cir. 2002). Indeed, "[b]ecause of the potential consequences of deficient performance during capital sentencing, we must be sure not to apply a more lenient standard of performance to the sentencing phase than we apply to the guilt phase." *Mak v. Blodgett*, 970 F.2d 614, 619 (9th Cir. 1992).

To prevail on his claim of ineffective assistance of counsel during the penalty phase of his trial, Summerlin must demonstrate first that the performance of his counsel fell below an objective standard of reasonableness at sentencing, and second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

[2] The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' " *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688). However, general principles have emerged regarding the duties of criminal defense attorneys that inform our view as to the "objective standard of reasonableness" by which we assess attorney performance, particularly with respect to the duty to investigate. For example, the Supreme Court has cited with approval the ABA Standards for Criminal Justice as indicia of the obligations of criminal defense attorneys. *Rompilla v. Beard*, 125 S.Ct. 2456, 2465-66 (2005); *Williams*, 529 U.S. at 396; *see also Wiggins*, 539 U.S. at 524 (noting that "we have long referred [to the ABA standards] as 'guides to determining what is reasonable' " (quoting *Strickland*, 466 U.S. at 688)). The standards in effect at the time of Summerlin's trial clearly described the criminal defense lawyer's duty to investigate, providing specifically that:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

ABA Standards for Criminal Justice 4-4.1 (2d ed. 1980).

[3] The duty to investigate is critically important in capital penalty phase proceedings. In a capital case, a criminal defendant has a constitutionally protected right to provide the jury with mitigating evidence. *Williams*, 529 U.S. at 393. Accordingly, a criminal defense attorney has a duty to investigate, develop, and present mitigation evidence during penalty phase proceedings. *Wiggins*, 539 U.S. at 521-23. "To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present[] and explain[] the significance of all the available [mitigating] evidence.' " *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en banc) (quoting *Williams*, 529 U.S. at 399).

[4] Although we must defer to a lawyer's strategic trial choices, those choices must have been made after counsel has conducted "reasonable investigations or [made] a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. During penalty phase proceedings, counsel has a duty to make a "diligent investigation into his client's troubling background and unique personal circumstances." *Williams*, 529 U.S. at 415 (O'Connor, J., concurring). As the Supreme Court has stated, there is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyde v. California*, 494 U.S. 370, 382 (1990) (quotation and emphasis omitted). Thus, as we have noted, " '[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase.' " *Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir. 1999) (quoting *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999) (brackets in original)).

[5] To that end, the investigation should include inquiries into social background and evidence of family abuse. *Boyde v. Brown*, 404 F.3d 1159, 1176 (9th Cir. 2005). We have long "recognized an attorney's duty to investigate and present mitigating evidence of mental impairment." *Bean*, 163 F.3d at 1080 (citing *Evans v. Lewis*, 855 F.2d 631, 636-37 (9th Cir. 1988)). This includes examination of mental health records. *Deutscher v. Whitley*, 884 F.2d 1152, 1161 (9th Cir.

1989). Defense counsel should also examine the defendant's physical health history, particularly for evidence of potential organic brain damage and other disorders. *Stankewitz v. Woodford*, 365 F.3d 706, 723 (9th Cir. 2004).

[6] The defendant's history of drug and alcohol abuse should also be investigated. *Jennings v. Woodford,* 290 F.3d 1006, 1016-17 (9th Cir. 2002). Defense counsel should also personally review all evidence that the prosecution plans to introduce in the penalty phase proceedings, including the records pertaining to criminal history and prior convictions. *Rompilla,* 125 S.Ct. at 2465; ABA Standards for Criminal Justice 4-4.1 (2d ed. 1980). It should go without saying that defense counsel needs to meet with his client to discuss the preparation of the penalty phase defense. *See Silva*, 279 F.3d at 847 (counsel has a duty to try to persuade defendant to present mitigating evidence and counsel cannot make a reasoned tactical decision if he does not even know what evidence is available).

This list is not meant to be exhaustive, but only illustrative of the minimal type of "objectively reasonable" investigation any competent capital defense attorney should conduct in preparing a penalty phase defense, even at the time Summerlin's case was tried.

The record shows that Summerlin's attorney utterly failed in his duty to investigate and develop potential mitigating evidence for presentation at the penalty phase. He conducted no investigation of Summerlin's family and social history. He did not speak with Summerlin's family or friends. His development of a mental health defense was based solely on the limited information developed at Summerlin's pre-trial competency examination, which was prepared for an entirely different purpose. *See Bean*, 163 F.3d at 1078 (not reasonable to rely at penalty phase on mental health material previously amassed for competency challenge); *see also Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995) (investigation of mental health evidence for guilt phase does not excuse failure to develop mental health evidence for penalty phase).

Had Summerlin's attorney conducted even a minimal investigation, he would have been able to develop testimony about Summerlin's tortured family history, including the fact that Summerlin's alcoholic mother beat him frequently and punished him by locking him in a room with ammonia fumes. Counsel would have learned that, at his mother's behest, Summerlin received electroshock treatments to control his explosive temper. Summerlin's attorney would also have discovered that Summerlin had a learning disability that left him functionally mentally retarded. An adequate investigation would have revealed that Summerlin had been diagnosed as a paranoid schizophrenic and treated with anti-psychotic medication.

Summerlin's trial counsel did not develop any mental health defense himself; rather, he relied on information uncovered by Summerlin's prior attorney to determine competency and to explore a potential mental disease guilty phase defense. Counsel's lack of understanding of the basics of the potential guilty phase defense, and its more effective use as mitigation evidence at the penalty phase, was demonstrated during post-conviction hearings:

Q. Did you ever talk to any other doctor or expert witness about psychomotor seizures?

A. No.

Q. Did you do any research regarding psychomotor seizures?

A. No.

Q. Did you ever learn that Warren Summerlin had organic brain damage?

A. I believe that that appeared somewhere in the medical reports. I'm not sure. It sounds familiar at this time.

Q. What significance was that fact that he had organic brain damage to you?

A. Well, I — if I knew at the time, I don't know now. So I guess I would have to say I don't remember.

Q. Were you aware of any relationship between organic damage and psychomotor seizures?

A. At this time, I'm not. I just don't have any memory of being aware of such a thing.

Q. Did you ever learn while you were preparing for trial that Warren Summerlin had had mumps at birth?

A. I don't remember, but I don't believe so.

Q. Dr. Bendheim and Dr. Tuchler were the Rule 11 examining doctors?

A. Okay.

Q. Did you ever talk to Dr. Bendheim before the trial?

A. No.

Q. Did you ever talk to Dr. Tuchler before the trial?

A. No.

Q. Did you talk to Dr. Winegrad, a neurologist before the trial?

A. No.

[7] In short, Summerlin's attorney failed to investigate the available evidence concerning possible mental health mitigation either prior to the guilt phase trial or the penalty phase hearing, clearly missing critical mitigation evidence. Summerlin's prior attorney had investigated Summerlin's mental health and communicated the results to his trial attorney. The preliminary mental health information was in the hands

of Summerlin's attorney, yet he failed to do any further investigation or development of this critical mitigation evidence. "[W]here counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as a mitigating factor in a penalty phase hearing, without a supporting strategic reason, constitutes deficient performance." *Hendricks*, 70 F.3d at 1043; *see also Wallace v. Stewart*, 184 F.3d 1112, 1115-16 (9th Cir. 1999) (holding ineffective an attorney who spent just over two hours total interviewing potential witnesses, including just over thirty minutes with a psychiatric expert, and failed to contact known and willing witnesses); *Seidel v. Merkle*, 146 F.3d 750, 756 (9th Cir. 1998) (finding ineffective assistance where defense counsel "failed to conduct even a minimal investigation in order to make an informed decision" regarding his client's mental health defenses).

Although Summerlin's trial attorney knew that the prosecution planned in the penalty phase hearing to call as witnesses the two psychiatrists the court had appointed to evaluate Summerlin's competency, he did not contact or interview either of them. As he testified:

> Q. Did you know in advance of the aggravation/mitigation hearing that the State was calling Dr. Bendheim and Dr. Tuchler as witnesses?
>
> A. I don't know whether I knew that in advance or not.
>
> Q. Showing you Exhibit 83, and the Clerk's record in 119502, which appears to be a letter dated June 24th, 1982 from Jessica Gifford to you, would you take a minute to review it?
>
> A. All right. I've reviewed it.
>
> Q. Does it indicate that Miss Gifford was advising you by that letter that she would be subpoenaing Dr. Bendheim and Dr. Tuchler for the aggravation/mitigation hearing?

A. It does so indicate.

Q. Mr. Klink, the aggravation/mitigation hearing took place on July 8th —

A. July 8th.

Q. — July 8th of 1982. Did you talk to Dr. Bendheim before July 8th, 1982?

A. Not before July 8th, I don't believe.

Q. Did you talk to Dr. Tuchler before July 8th, 1982?

A. I don't believe so.

[8] Failure to review evidence that the attorney knows the State will produce at a penalty phase trial falls below an objective standard of reasonableness for performance in preparing for a penalty phase defense. As the Supreme Court recently observed in *Rompilla*:

> The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense. As the District Court points out, the American Bar Association Standards for Criminal Justice in circulation at the time of Rompilla's trial describes the obligation in terms no one could misunderstand in the circumstances of a case like this one:
>
> "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities."

125 S.Ct. at 2465-66.

The Supreme Court termed counsel's failure to investigate evidence that counsel knows the State will use against the defendant at the penalty phase trial "an obvious reason" to conclude that counsel's performance "fell below the level of reasonable performance." *Id.* at 2464. As the Court further noted:

> With every effort to view the facts as a defense lawyer would have done at the time, it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation.

Id. at 2465.

[9] In this case, just as in *Rompilla*, the failure of the defense attorney to investigate evidence the State planned to introduce at the penalty phase trial constituted constitutionally deficient performance.

During the one month interval between the trial and the death penalty phase hearing, Summerlin's attorney never once met with his client. As his attorney testified in post-conviction proceedings:

> Q. * * * * During that period of time between the verdict and the aggravation/mitigation hearing, how many times did you meet with Warren Summerlin?
>
> A. I don't remember.
>
> Q. As a court appointed counsel did you keep contemporaneous time records in connection with this case?
>
> A. That's correct, as best I could.
>
> Q. I'm showing you four separate documents. Do they appear to be the time records in this case — in these cases?
>
> A. They do.

Q. Okay. Would reviewing those refresh your recollection as to how many times you saw Mr. Summerlin between verdict and the aggravation/mitigation hearing?

A. Yes, I'm sure I would have recorded that time if I had met with him.

Q. Take a look at those documents, then tell us how many times you saw Warren Summerlin between the verdict and the aggravation/mitigation hearing?

A. * * * It does not appear that I met with Mr. Summerlin after the date of the verdict, until we got to court, for the mitigation aggravation hearing.

[10] "Adequate consultation between attorney and client is an essential element of competent representation of a criminal defendant." *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983). We have held that limited consultations may constitute deficient performance by a criminal defense attorney. *See Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1998) ("Counsel's admission that he spent at most forty-five minutes with Turner prior to trial demonstrates deficient performance . . . [and] is especially shocking in light of the seriousness of the charges"); *Correll v. Stewart*, 137 F.3d 1404, 1412 (9th Cir. 1998) (finding counsel's performance deficient when the attorney only met with the defendant for five minutes between the guilt and penalty phase proceedings, there were no consultations at all. *See Silva*, 279 F.3d at 847 (counsel has a duty to try to persuade defendant to present mitigating evidence and counsel cannot make a reasoned tactical decision if he does not even know what evidence is available).

[11] These are precisely the failings that both the Supreme Court and our Circuit have held constitute deficient performance of counsel under the Sixth Amendment. Summerlin's penalty phase counsel did not conduct any independent investigation, not even consulting with his client. There is no explanation for this in the record. His failure to investigate falls far short of any objectively reasonable standard against

which we might measure attorney performance under the standards of the Sixth Amendment.

B

[12] A capital defense attorney not only has the duty to investigate potential mitigation defenses, but to present them. As we have put it bluntly: "Failure to present mitigating evidence at the penalty phase of a capital case constitutes ineffective assistance of counsel." *Bean*, 163 F.3d at 1079; *see also Correll*, 137 F.3d at 1412 (finding counsel's performance deficient when the attorney failed to call any mitigation witnesses despite knowing people who were willing to testify, and barely raised the defendant's psychiatric history as a mitigating factor).

In this case, Summerlin's attorney did not present any mitigating evidence during the penalty phase, but instead suggested that the sentencing judge review Dr. Tatro's pre-trial guilt phase report, which was appended to the presentence report. The penalty phase trial was an extremely short proceeding, extending only twenty-six transcript pages, more than half of which constituted colloquy between counsel and the court. The court first entertained argument on the defense motion for a new trial, which the judge indicated he would consider over the weekend. For its case in aggravation, the State argued that two statutory aggravating factors existed: (1) a prior felony conviction involving the use or threat of violence; and (2) that the instant capital crime was especially heinous, cruel, or depraved. The State's aggravation case consisted of only one exhibit, specifically certified copies of documents relating to the aggravated assault conviction. The State then asked the judge to consider the trial testimony and rested its case. The entirety of the State's aggravation case was recorded in one page of transcript.

For the defense case in mitigation, Summerlin's attorney called one of the prior attorney's consulting psychiatrists to the stand to testify. However, before the witness could be sworn in, Summerlin interrupted and—although the conversation is not in the trial transcript—apparently requested that his attorney not present the witness. Counsel requested

a five-minute recess, at the conclusion of which he stated: "With the consent of the Defendant, the Defendant has no witnesses in mitigation at this time and . . . we'll rest."

The judge reminded Summerlin and his attorney that this was the time set aside for the aggravation and mitigation hearing and that he planned to proceed with sentencing the next Monday. The judge then said, "So you tell me that you have one witness that you may present on Monday?" Summerlin's attorney replied: "Well, I would not call any witnesses at all." The judge indicated that he would allow Summerlin to make any statement that he wished to make, either at the present hearing or on Monday. Subsequently in the hearing, Summerlin's attorney stated he would rely on Dr. Tatro's report appended to the presentence report. The State proceeded by presenting two rebuttal psychiatric witnesses. Counsel's argument against a death sentence for his client took up all of three pages of transcript.

The net result was that Summerlin presented no affirmative evidence and no rebuttal evidence, although—as we have discussed—there was an abundance of available classic mitigation evidence concerning family history, abuse, physical impairments, and mental disorders.

In addition, there was significant mitigation concerning one of the two statutory aggravating factors: his conviction for aggravated assault. That conviction arose out of a road rage incident in which a car veered off the road, jumped the curb and struck Summerlin's wife, who was hospitalized for her injuries. At the scene, Summerlin brandished a pocket knife at the errant driver, an act that occasioned the filing of the criminal assault charge. The victim was not physically injured in any way. Summerlin's attorney knew of these mitigating factors because he had defended the charge. However, he did not present any of this mitigation evidence to the sentencing judge. As the attorney testified later:

Q. Mr. Klink, did you believe that there was some mitigating circumstances in connection with the aggravated assault conviction?

A. Well, I think we discussed before we came in here, and there was [sic] some mitigating circumstances that were discussed or talked about with Judge Riddel at the sentencing on the aggravated assault charge. Now, with respect to your question, did I believe there was any mitigating circumstances with respect to the conviction about which we are here today?

Q. With respect to the conviction of the aggravated assault?

A. Well, yes. I discussed them, I believe, in front of Judge Riddel [the sentencing judge on the aggravated assault conviction]. I'm not sure, but I demonstrated — I tried to present some mitigating factors, yes.

Q. Did you ever present any mitigating factors in connection with that conviction to Judge Marquardt [the sentencing judge in the capital case]?

A. No.

Q. In connection with that aggravated assault case, was the victim Mary Lavus ever physically injured by Warren Summerlin?

A. No, I don't believe so.

Q. She suffered no physical injury?

A. I don't believe so, no.

* * * * *

Q. He did not physically harm her?

A. That's correct.

Q. You recall why Warren Summerlin approached the driver of that automobile?

A. Right. As I recall, it was a reaction to the fact that this lady either had lost control of the car or her brakes had failed, or some such thing like that, resulting in the car knocking over Mr. Summerlin's wife and knocking her into a glass window of a store front, I believe. And that's what precipitated the reaction of Mr. Summerlin in committing the offense.

[13] In sum, Summerlin's penalty phase attorney knew of essential mitigating evidence concerning the key special circumstance urged by the prosecution, but did not present this mitigation evidence at the penalty phase. The prosecution's introduction of a certified copy of the aggravated assault conviction was the only evidence received by the sentencing court; the defense offered no mitigation or other rebuttal evidence to counter the State's case in aggravation.

Summerlin's attorney apparently also failed to object or make any arguments concerning the presentence report. The presentence report was prepared by a probation officer who did not testify during the penalty phase. It contained numerous sentencing recommendations from the victim's family and friends, police officers, and others. Attached to the presentence report were a large number of letters from members of the community expressing their opinions, including a petition with over 500 signatories. The presentence report also contained the probation officer's opinion as to the heinous nature of the crime and expressed her opinion that the judge should impose the death sentence. All of the material contained in the report constituted hearsay, inadmissible evidence. Almost all of it was damaging to the defendant. Not only did Summerlin's attorney fail to object to its consideration, but he commended the presentence report to the sentencing judge for review by urging the judge to review the Tatro letter attached to it.

[14] "The failure to present mitigating evidence during the penalty phase of a capital case, where there are no tactical considerations involved, constitutes deficient performance, since competent counsel would have made an effective case for mitigation." *Smith v. Stewart*, 189 F.3d 1004, 1008-09 (9th Cir. 1999). Summerlin's counsel has presented no tactical explanation for his decision not to present mitigating evidence. His failure fell below the objective standards of reasonableness for attorney conduct in a penalty phase trial. Summerlin did not have the effective assistance of counsel at his penalty phase guaranteed by the Sixth Amendment. *See Rompilla*, 125 S. Ct. at 2465 n.5 ("We may reasonably assume that [the sentencer] could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution's characterization of the conviction would suggest.").

C

The State contends that none of this is relevant because Summerlin requested that mitigating evidence not be presented in his defense. The record does not support such a dismissive view of Summerlin's position. At the commencement of the penalty phase hearing, Summerlin's attorney called psychologist Tatro to the stand. Summerlin apparently objected to this, and the following colloquy ensued:

> THE COURT: All right. Come forward and be sworn, please. Your client wants to ask a question.
>
> MR. KLINK: Well, your honor, may we approach the bench?
>
> THE COURT: All right.
>
> (An off the record discussion at the bench ensued, outside the hearing of the court reporter.)

THE COURT: At the request of defense counsel and his client, the client would like to have a couple of minutes to talk over the calling of this witness.

* * *

MR KLINK: All right, your honor. With the consent of the defendant, the defendant has no witnesses in mitigation at this time and—

THE COURT: This will be—

MR. KLINK: —and we'll rest.

* * *

MS. GIFFORD (The Prosecutor): Your honor, it's my understanding—at least my impression—that this is the defendant's decision that he does not wish certain witnesses to be called. Could we have that reflected on the record, perhaps, because—

THE COURT: I think it has been, and Mr. Summerlin, I'll address you directly, to make sure that—for any error that might possibly be claimed at this time—to make sure that you understand that you are facing a potential decision between either life imprisonment or the death penalty, and this is the time in which you must decide whether you present any mitigation witnesses on your behalf.

This is your entitlement. Your lawyer has told me that at this time you do not wish to, and he is telling that you do not wish to call any mitigation witnesses. If this is correct I'll accept your decision.

But I want it to be very clear that this is the time, and only time, that you'll be able to have to do this.

So, you don't even need to respond to me. You understand what I'm telling you?

THE DEFENDANT: Yes.

The actual conference between attorney and client is not on the record, and Summerlin's attorney has no recollection of it. As he later testified:

Q. Does [review of the transcript] refresh your recollection as to what occurred on that date?

A. It doesn't refresh it. But the — what is indicated in here, I have no dispute that it took place.

Q. It is indicated that you did, in fact, verbally call Dr. Tatro to the stand?

A. It does so indicate.

Q. And then, at that point, there was some kind of conference with your client, Mr. Summerlin?

A. It does so indicate.

Q. And you had some discussion. At the conclusion of that discussion, Dr. Tatro, the witness, was withdrawn. And your client apparently was informed of his right to call any witnesses in mitigation, and he declined that right?

A. It appears from the record that that is the case. The discussion I had with him after Dr. Tatro was called as a witness, I have absolutely no recollection of what took place during that discussion. I wish I can, it might be very enlightening for one side or the other.

[15] Summerlin did not testify as to the content of the conversation. As a result, there is no record of what Summerlin said, much less that he instructed his attorney not to present any penalty phase defense whatsoever. Thus, the characterization of this exchange as one of a client directing an attorney not to present a penalty phase defense is not supported by the record. Summerlin spontaneously objected to the presentation of one witness; there is no indication that he was instructing his attorney not to present any mitigating evidence and no aggravation rebuttal. In fact, Summerlin's counsel later clarified that Summerlin wished to rely on Dr. Tatro's earlier evaluation, which had been appended to the presentence report. Summerlin also expressed that he "had great faith in Dr. Garcia," a psychiatrist who had examined Summerlin during the pre-trial period, indicating that he might not be adverse to the presentation of mental health evidence at the penalty phase hearing. This type of record is insufficient to establish that Summerlin wished to waive a mitigation defense or prevent the introduction of mental health evidence. *See Silva*, 279 F.3d at 839-40 (noting that the record did not support the conclusion that Silva precluded counsel from investigating any and all aspects of Silva's background; Silva merely instructed counsel not to call Silva's parents as witnesses during the penalty phase); *see also Stankewitz v. Woodford*, 365 F.3d 706, 721-22 (9th Cir. 2004) (defendant's opposition to calling family members or experts as witnesses does not excuse an attorney from interviewing experts and family members or from investigating documents containing mitigating evidence); *cf. Williams v. Woodford*, 384 F.3d 567, 621-22 (9th Cir. 2004) (the district court expressly found that Williams instructed counsel not to call any witness at the penalty phase, rejecting Williams's contention that he had merely instructed counsel not to call his parents).

[16] However, even if Summerlin had instructed counsel not to present a mitigation defense, that fact would have no effect on the deficient conduct prong of *Strickland* because counsel had already demonstrated ineffectiveness by failing to thoroughly investigate the existence of mitigating factors. Although the allocation of control between attorney and client typically dictates that "the client decides the 'ends' of the lawsuit while the attorney controls the 'means,' " Marcy

Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. Rev. 315, 318 (1987), it does not relieve an attorney of the duty to investigate potential defenses, consult with the client, and provide advice as to the risks and potential consequences of any fundamental trial decision within the client's control.

[17] This is especially true in capital cases, wherein the attorney defending the accused has the duty to render "extraordinary efforts." ABA Standards for Criminal Justice 4-1.2(c). These efforts include the duty "to develop a plan for seeking to avoid the death penalty and to achieve the least restrictive and burdensome sentencing alternative which can reasonably be obtained." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 11.8.2 (1989) The defense attorney must "explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." ABA Standards for Criminal Justice, 4-3.8(a). For these reasons, "a lawyer who abandons investigation into mitigating evidence in a capital case at the direction of his client must at least have adequately informed his client of the potential consequences of that decision and must be assured that his client has made [an] 'informed and knowing' judgment." *Silva*, 279 F.3d at 838 (citing *Jeffries v. Blodgett*, 5 F.3d 1180, 1198 (9th Cir. 1993)); *cf. Williams*, 384 F.3d at 622-23 (noting that counsel reasonably investigated potential mitigating evidence and adequately conferred with Williams regarding what penalty phase defense might be presented). further, "a lawyer's duty to investigate is virtually absolute, regardless of a client's expressed wishes." *Silva*, 279 F.3d at 840 (citing ABA Standards for Criminal Justice 4-4.1, cmt. at 4-5.5 (2d ed. 1980)); *see also Douglas*, 316 F.3d at 1089-90.

Under circumstances similar to the case at hand, we have concluded that the attorney's performance was constitutionally inadequate. In *Silva*, for example, the defendant had expressly instructed his attorney not to call his parents as witnesses. We concluded that this could not be construed as supporting an inference that he did not wish his family background to be investigated. *Silva*, 279 F.3d at 839. Further, in

Silva, as in this case, the attorney did not "ma[ke] a serious attempt to educate [the defendant] about the consequences of his decision." *Id.* at 841. We held that "such conduct was objectively unreasonable under the circumstances and again amounted to deficient performance. . . ." *Id.* Further, we concluded that, even when faced with client directives limiting the scope of defense, an attorney "must conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." *Id.* at 846 (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1456-57 (9th Cir. 1994)). "[I]f a client forecloses certain avenues of investigation, it arguably becomes even more incumbent upon trial counsel to seek out and find alternative sources of information and evidence, especially in the context of a capital murder trial." *Douglas*, 316 F.3d at 1086 (quoting *Silva*, 279 F.3d at 847). Summerlin's attorney did none of this.

The Supreme Court recently reaffirmed this duty, even when the capital defendant is "uninterested in helping" and "even actively obstructive" to developing a mitigation defense. *Rompilla*, 125 S.Ct. at 2462. Similarly, we have rejected the theory that a criminal defendant's instructions reduce an attorney's professional obligations even when the defendant attempts to curtail certain potential avenues of defense. *Douglas*, 316 F.3d at 1086; *Silva*, 279 F.3d at 838.

In the capital case context, there are additional due process concerns. A defendant's waiver must be knowing, voluntary, and intelligent. *Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990). This standard does not only mean that the defendant's waiver must be an informed decision, but also that it must be a competent one. If a client has elected to forego legal proceedings that could avert the imposition of the death penalty, then a court must make the determination "whether he has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Rees v. Peyton*, 384 U.S. 312, 314 (1966). That decision must be made "in the present posture of things," *id.*, that is, a determination of capacity at the time of the decision to forego legal proceedings.

When all of these conditions have been met, we have sustained a criminal defendant's decision to limit a mitigation defense. *See, e.g., Jeffries*, 5 F.3d at 1198. When the conditions have not been satisfied, we have not. *See, e.g., Silva*, 279 F.3d at 838.[1]

[18] Applying these principles to the case at hand, we can easily determine that Summerlin's attorney's decision not to present mitigation evidence cannot be excused by his client's apparently spontaneous objection to certain testimony at the penalty phase hearing. First, as we have discussed, Summerlin's attorney did not conduct an adequate investigation. Second, he did not consult with his client at all prior to the penalty phase hearing, much less provide the advice necessary for the client to provide informed consent to forego a mitigation defense. Third, the decision regarding which witnesses were to be called rested with Summerlin's attorney, not Summerlin. Fourth, the record does not support the conclusion that Summerlin's spontaneous reaction constituted an unequivocal direction not to conduct any penalty phase defense. Fifth, because the failure to provide a mitigation defense amounted to a concession that the death penalty should be imposed in this case, the court was obligated to make sure that this was a competent, voluntary, intelligent, informed, and knowing decision. Indeed, because the consequences were so dire—Arizona law mandated a penalty of death in this situation without the presentation of mitigating evidence—a showing that Summerlin's decision was knowing, intelligent, and voluntary was required. *Cf. Whitmore*, 495 U.S. at 164. In sum, Summerlin's spontaneous outburst cannot serve to excuse Summerlin's attorney's failure to present mitigating evidence at the penalty phase hearing.

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1. We need not reach, nor do we reach, the question of whether presentation of some mitigation evidence is constitutionally required in a capital case, regardless of the client's informed decision to forego a defense *See, e.g., People v. Deere*, 710 P.2d 925 (Cal. 1985); *State v. Hightower*, 518 A.2d 482 (N.J. Super. Ct. App. Div. 1986).

D

[19] Although we have concluded that Summerlin's attorney rendered constitutionally ineffective assistance of counsel in investigating, developing, and preparing the penalty phase presentation of this capital case, that alone is not enough to justify habeas relief. Summerlin must also show that he was prejudiced by the ineffective assistance. Under *Strickland,* this means that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Here, the evidence of prejudice is more than ample.

[20] First, the failure to present a mitigation defense all but assured the imposition of a death sentence under Arizona law. At the time, Arizona law mandated the death penalty when the defendant had a qualifying prior conviction if there was no mitigating evidence. Ariz. Rev. Stat. § 13-703. Although Summerlin only had one prior conviction, the "road rage" aggravated felony conviction, it qualified as a "dangerous felony." Without mitigating evidence, a death sentence was virtually assured. *See Evans v. Lewis*, 855 F.2d 631, 636-37 (9th Cir. 1988) (noting that in Arizona, once an aggravating circumstance like a prior aggravated felony was found, death was inevitable without mitigating evidence, and thus holding that the failure to pursue psychiatric evidence constituted prejudicially deficient performance); *see also Smith v. Stewart*, 140 F.3d 1263, 1268, 1270 (9th Cir. 1998) (stating that in light of Arizona's statute, counsel's "few asthenic comments" at sentencing amounted to a "virtual admission that the death penalty should be imposed upon his client").

[21] Second, this was not by any means a clear-cut death penalty case. The initial, very experienced, prosecutor did not believe he could succeed in obtaining a death sentence given the facts and applicable law. Indeed, the prosecutor assented to an extremely favorable plea agreement. Under the proposed please agreement, Summerlin was to enter an *Alford* plea, *see North Carolina v. Alford*, 400 U.S. 25 (1970),

which enabled him, without admitting guilt, to plead guilty to second-degree murder and aggravated assault and to be sentenced accordingly. The agreement stipulated that Summerlin would be sentenced to twenty-one years in prison for the murder of Ms. Bailey, of which he would be required to serve fourteen. The agreement was subject to court approval. If the court rejected the stipulated sentence, Summerlin could either (1) allow his plea to stand and be sentenced to a term of up to thirty-eight-and-one-half years, according to the court's sole discretion, or (2) withdraw his plea of guilty and have the matters proceed to trial and disposition.

This plea agreement was withdrawn after Summerlin's initial attorney and the prosecuting attorney were replaced. However, it is indicative of the fact that this was not a clear-cut capital case.

[22] Third, a measure of assessing prejudice in a capital penalty phase proceeding is to "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. In doing so, we must bear in mind the Supreme Court's observation in this case that Arizona law required proof of aggravating factors beyond a reasonable doubt. *Summerlin*, 124 S.Ct. at 2522 n.1 (citing *State v. Jordan*, 614 P.2d 825, 828 (Ariz. 1980)).

In this case, there were only two aggravating circumstances relied upon by the sentencing judge. The judge based his decision as to aggravating circumstances on two statutory grounds: (1) that the defendant had a prior felony conviction involving the use or threatened used of violence on another person, Ariz. Rev. Stat. § 13-703(F)(2) (1981) (later amended in 1993); and (2) that Summerlin committed the offense in an especially heinous, cruel, or depraved manner, *id.* §13-703(f)(6). The sentencing judge found no mitigating circumstances.

Significant mitigating circumstances surrounded Summerlin's aggravated assault conviction. However, they were not presented to the sentencing judge. Summerlin did not have any other significant criminal history; this fact was also not presented at the penalty phase.

Counsel's failure to present evidence mitigating the prior conviction aggravator is particularly significant. Notably, the State's evidence in support of the only other statutory aggravating factor urged by the State —that Summerlin committed the offense "in an especially heinous, cruel, or depraved manner"—was not particularly strong. the Arizona Supreme Court has noted that these are "admittedly broad subjective terms." *State v. Vickers*, 768 P.2d 1177, 1188 n.2 (Ariz. 1989). The assessment of whether a crime is "heinous" depends on the "mental state and attitude of the perpetrator as reflected in his words and actions." *State v. Gretzler*, 659 P.2d 1, 10 (Ariz. 1983) (citations omitted). Thus, proof of premeditation is especially important in determining whether the statutory aggravator has been proven beyond a reasonable doubt.

The basis of the State's premeditation theory was not that Summerlin had planned the crime; in fact, the State never contended that he did. Rather, the State's theory was that he formed the required premeditation almost instantaneously during the commission of the crime. Although instantaneous premeditation may suffice for establishing premeditation for the underlying conviction under Arizona law, *see State v. Neal*, 692 P.2d 272, 276 (Ariz. 1984) (noting that the "length of time could have been as instantaneous as it takes to form successive thoughts in the mind"), instantaneous premeditation is not definitive for the purpose of establishing the especially heinous, cruel, or depraved aggravator. The State relied on the facts of the crime to support the especially heinous, cruel, or depraved aggravator. the strong psychiatric evidence of Summerlin's lack of impulse and emotional control and organic brain dysfunction could have provided significant mitigating evidence countering the State's circumstantial evidence that the crime was committed in an especially heinous manner. In sum, the evidence underlying the aggravating factors was not strong, particularly when measured against the requirement that aggravating factors be proven beyond a reasonable doubt.

In contrast, examining the available mitigating evidence that the Supreme Court has identified as significant, Summerlin's potential case in mitigation was strong. He had a compelling childhood history of

physical and mental abuse; deserted by his father who was later killed in a police shoot-out; locked repeatedly in an ammonia-fumed room by his mother; and subjected to electroshock at his mother's insistence. He had learning disabilities, to the point of being considered "functionally mentally retarded." He was diagnosed as a paranoid schizophrenic and treated with anti-psychotic medications. He was also diagnosed as having an explosive personality disorder with impaired impulse control. One psychiatrist found indications of organic brain impairment, borderline personality disorder, and paranoid personality disorder. In his opinion, Summerlin "is deeply emotionally and mentally disturbed, unaware of the motives underlying much of his behavior, and unable, because of his problems, to exercise normal restraint and control, once his highly unstable and volatile emotions are aroused." All of this was not only highly relevant as general mitigation, but was also evidence that could directly counter the other aggravating factor urged by the State, namely that the crime had been committed in a 'heinous, cruel, or depraved manner,' in the balancing of mitigating and aggravating factors by the trial court.

The State suggests that no prejudice occurred because all of the mitigating evidence was contained in Dr. Tatro's letter attached to the presentence report. However, the report cited by the State was not a psychiatric evaluation prepared for the penalty phase. It was a letter from Tatro to Summerlin's former attorney that pre-dated the initial trial. The purpose of the evaluation at that stage, and the focus of the letter, was to determine whether Summerlin was competent to stand trial and whether a potential insanity defense was available. Tatro's conclusion was that no guilt phase defense was available under the *M'Naghten* test, which had been adopted by Arizona "as the sole standard for criminal responsibility." *State v. Ramos*, 648 P.2d 119, 121 (Ariz. 1982). To sustain a defense of legal insanity under the test, "[a]n accused must have had at the time of the commission of the criminal act: (1) Such a defect of reason as not to know the nature and quality of the act, or (2) If he did know, that he did not know he was doing what was wrong." *State v. Christensen*, 628 P.2d 580, 583 (Ariz. 1981) (internal quotation marks omitted). These considerations are far different from those involved in a penalty phase mitigation defense.

We have cautioned that in presenting a penalty phase mitigation defense based on mental health, counsel should not merely rely on competency evaluations conducted at the guilt phase, which are prepared for a different purpose. *Bean*, 163 F.3d at 1078-79 (concluding that defense counsel was not reasonable to rely at penalty upon mental health evidence previously amassed for competency challenge); *see also Hendricks*, 70 F.3d at 1043-44 (stating that investigation of mental health evidence for guilt phase does not excuse failure to develop mental health mitigation evidence for penalty phase).

Dr. Tatro was a psychologist, not a psychiatrist or a neurologist. As a result, it is perhaps understandable that Dr. Tatro's letter did not discuss a key mental health defense, namely that of psychomotor epilepsy. The evidence of psychomotor epilepsy was available to Summerlin's counsel, but he did not pursue it. For example, Dr. Leonardo Garcia-Brunuel, a psychiatrist who examined Summerlin in the early stages of the case, was prepared to testify that Summerlin had a temporal lobe seizure disorder and had a psychomotor seizure when he committed the murder. Dr. Garcia testified that this may have caused uncontrollable behavior. Other psychiatrists, who were available to Summerlin's attorney at the time, testified that they had not tested Summerlin for this condition, but if the diagnosis were correct, a psychomotor seizure would have strongly affected Summerlin's ability to control his actions after the onset of the seizure. This is significant mitigation testimony that was available to Summerlin's attorney but not presented in Tatro's competency letter. Further, Dr. Tuchler, one of Summerlin's other examining physicians, conceded at the state habeas evidentiary hearing that based "on material that has been brought up subsequently," he believed that there may have been a complete loss of impulse control that affected Summerlin's ability to conform his conduct to the requirements of the law. Therefore, the notion that the Tatro letter presented a complete view of available mitigating factors is not correct.

[23] When considered in the aggregate, the available mitigating evidence in this case is far more compelling than the evidence the Supreme Court held adequate to establish prejudice in *Wiggins*, 539

U.S. at 534-38. As the Supreme Court noted, "[h]ad the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 537. Although, for the purposes of resolving this issue, we evaluate prejudice in the context of judge-sentencing, the result is the same. The fact that Summerlin's counsel did not present evidence to mitigate the aggravated assault special circumstance, nor evidence to mitigate the alleged "heinous, cruel, or depraved manner" in which the crime was committed, undermines our confidence in the court's imposition of a death sentence, particularly since the State was required to prove aggravating factors beyond a reasonable doubt. For these reasons, we conclude that the failure of trial counsel to investigate, develop, and present mitigating evidence at the penalty phase hearing has undermined our confidence in the sentence of death imposed by the trial judge. Had an adequate mitigation defense been presented, there is "a reasonable probability" that an objective sentencing factfinder "would have struck a different balance." *Id.*; *see also Strickland*, 466 U.S. at 693 (noting that a reasonable probability of a different result is less than the preponderance more-likely-than-not standard); *Rompilla*, 125 S.Ct. at 2469 ("[A]lthough we suppose that [the sentencer] could have heard it all and still have decided on the death penalty, that is not the test."). We therefore hold that Summerlin has established prejudice under the standards articulated in *Strickland.* He is entitled to habeas corpus relief.

III

[24] We have previously affirmed Summerlin's conviction. We reverse the district court's denial of a writ of habeas corpus as to the penalty phase and remand with instructions to grant the writ of habeas corpus as to the sentence unless the State begins resentencing proceedings within a reasonable time to be determined by the district court. Given our resolution of these issues, it is unnecessary to reach the other questions raised by Summerlin on appeal.

REVERSED AND REMANDED

SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

I concur in that portion of the court's opinion which holds that counsel's failure to investigate mitigating evidence constitutes constitutionally deficient performance. I must dissent, however, from the court's conclusion in Part II.D that the state court's affirmance of the death penalty violated constitutional standards. I agree with the district court's determination that Summerlin failed to demonstrate a reasonable probability that, but for counsel's constitutionally deficient performance, he would have received a lesser sentence. Because I would also affirm the district court on the two issues the court does not reach today, I would affirm the judgment of the district court denying the petition for writ of habeas corpus.

I must also dissent from the court's conclusion that counsel's failure to "contact or interview" the prosecution's rebuttal witnesses constitutes constitutionally deficient performance. Because this portion of the court's opinion approves the type of "per se" rule regarding attorney performance that *Strickland v. Washington*, 466 U.S. 668 (1984), precludes, I must respectfully dissent from that portion of Part II.A as well.

I

To prevail under *Strickland*, Summerlin must "affirmatively prove prejudice," which requires showing more than just the possibility that counsel's performance prejudiced the outcome. Instead, Summerlin must demonstrate "a reasonable probability" that, but for counsel's constitutionally deficient performance, he would have received a lesser sentence. *Id.* at 691, 693-94.

A

In my view, Summerlin has not met this burden. I agree with the district court that practically all the mitigating evidence was in fact before the sentencing judge. The presentence report and Dr. Tatro's psychological report described Summerlin's childhood — specifically

noting his alcoholic mother's proclivity to beat Summerlin so severely and consistently that he preferred juvenile detention to home — and his father's lengthy incarceration and shooting death in an armed robbery. The court cites only two new pieces of evidence regarding Summerlin's childhood: ammonia and electroshock treatments. While tragic, these additional details wold not have significantly added to the sentencing judge's picture of Summerlin's childhood.

Similarly, the sentencing judge was aware of substantially all the evidence regarding Summerlin's mental difficulties. Dr. Tatro's report described Summerlin's illiteracy, dyslexia, and his symptoms consistent with paranoid personality disorder. Though the report did not mention temporal lobe seizure disorder, it explained that Summerlin had borderline personality disorder and an organic brain impairment that "may well underlie some of the difficulty he has with keeping his impulses under control."

Finally, counsel's failure to present evidence within his possession of the circumstances surrounding Summerlin's prior felony conviction is irrelevant to the question of prejudice. The court does not hold — nor can it — that this omission, unrelated to counsel's failure to investigate, was constitutional error. Even if it were, the addition of this evidence, along with the small amount of new mental health and social history evidence, would not create a "reasonable probability" that the sentencing judge would have reached a different result. The prior conviction, regardless of the circumstances surrounding it, qualified as a statutory aggravating factor under Ariz. Rev. Stat. § 13-703 at the time.

Thus, in spite of Summerlin's counsel's constitutionally deficient investigation, practically all the available mitigation evidence that counsel would have uncovered through a reasonable investigation was already before the sentencing judge. In my view, therefore, Summerlin does not satisfy the second prong of the *Strickland* test. I would affirm the district court's determination that Summerlin failed to prove prejudice.

B

I would also affirm the district court's determination of two additional issues the court does not reach today because of its analysis of the prejudice issue.

As to the conflict of interest claim, I would affirm the district court's determination, for the reasons expressed in the three-judge panel opinion, that Summerlin was not prejudiced by the brief romantic encounter between the prosecutor and Summerlin's first attorney. *See Summerlin v. Stewart*, 267 F.3d 926, 930-941 (9th Cir. 2001), *withdrawn*, 281 F.3d 836 (2002). As to the state trial court's impairment, I would affirm the district court's determination, for the reasons expressed in Judge Kozinski's dissent from the three-judge panel opinion on this point, that the sentencing judge's purported marijuana addiction did not affect his performance in Summerlin's case. *Id.* at 957-964. Because the state court's affirmance of the death penalty did not violate constitutional standards, I am satisfied that the district court properly denied the petition for writ of habeas corpus.

II

I must also dissent from the portion of the court's opinion that characterizes counsel's failure to contact or to interview Dr. Bendheim and Dr. Tuchler as constitutionally deficient performance. The court cites *Rompilla v. Beard*, 125 S.Ct. 2456 (2005), to support the proposition that counsel's decision neither to contact nor to interview the prosecution's rebuttal witnesses fell below the constitutional threshold for ineffective assistance.

With respect, *Rompilla* does not support such a view. In *Rompilla*, the Supreme Court found constitutionally deficient performance where defense counsel failed to review a prior conviction case file that represented the *core* of the prosecution's aggravation case. Defense counsel knew the prosecution planned to present details from the case file — including the rape victim's trial testimony — yet failed to review the easily available file in order to counter the prosecution's

aggravation argument. *Rompilla*, 125 S.Ct. at 2464. By contrast, Summerlin's counsel, in spite of his other failings, did not fail to familiarize himself with the prosecution's aggravation evidence. The prosecution's only aggravating evidence was Summerlin's prior felony conviction. As the court notes, Summerlin's counsel knew well the details of this prosecution.

Summerlin's counsel's failure to "contact or interview" Dr. Benheim and Dr. Tuchler — the prosecution's rebuttal witnesses — does not constitute constitutionally deficient performance. Counsel had obtained the doctors' reports that formed the basis of their testimony. He also cross examined the doctors based on the conclusions in their reports and elicited them to concede several points in Summerlin's favor. The mere fact that counsel did not take the further step of *contacting* the doctors prior to the hearing does not render his performance constitutionally deficient. There is simply no showing that counsel would have learned anything more of relevance from personal contact with these doctors than what he had learned from their reports.

The Supreme Court has repeatedly warned against the creation of "specific guidelines" or "checklist[s] for judicial evaluation of attorney performance." *Strickland*, 466 U.S. at 688; *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Unfortunately, the court ignores this warning today.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

WARREN WESLEY SUMMERLIN, Petitioner,	No. CIV 86-584-PHX-ROS
vs.	MEMORANDUM OF DECISION AND ORDER
TERRY L. STEWART, et al.,[1] Respondents.	

Petitioner Warren Wesley Summerlin ("Petitioner") filed a Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. The Petition raises thirteen claims. For reasons set forth herein, the Court finds that Petitioner is not entitled to federal habeas corpus relief.[2]

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1. Terry L. Stewart, Director of the Arizona Department of Corrections, and Meg Savage, Warden of the Arizona State Prison, Florence Complex, are substituted pursuant to F.R.C.P. 25(d)(1).

2. In accordance with the United States Supreme Court's decision in Lindh v. Murphy, ___U.S.___, 117 S. Ct. 2059 (1997), this Court has not applied the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, to this case.

FACTUAL BACKGROUND

In the early morning of April 29, 1981, Brenna Bailey, a branch representative for Finance America in Tempe, Arizona, left her office to visit the residence of Dora Summerlin, Petitioner's wife. Finance America had lent money for a piano to Mrs. Summerlin, and the account was delinquent. Ordinarily, upon completing such a visit, Bailey would call her office supervisor. When she failed to do so or to come back to the office, he became concerned, telephoned her boyfriend Marvin Rigsby, and gave him the address of the home Bailey was supposed to visit.

Around 5:00 p.m., Rigsby arrived at the Summerlin residence. He spoke with Petitioner, who stated that Bailey had been there but had left by 10:30 a.m. Unable to find his girlfriend, Rigsby called the police. That same evening, an anonymous caller reported that a missing "Pacific Finance" women had been killed by a man named Warren Summerlin. The female caller told police that Summerlin had placed a rolled piece of carpet that appeared to contain a body into the trunk of his car. The caller was later identified as Petitioner's mother-in-law.

The next morning, Bailey's car was found in a parking lot located approximately one mile from Petitioner's home. A pair of women's panties, pantyhose, and shoes could be seen on the back floorboard. Detectives forced open the trunk and discovered the victim's partially-nude body alongside a crumpled bedspread soaked in blood. Her skull appeared crushed. Within the bedspread's lining, they found, among other things, green carpet tufts and pieces of spongy material.

Later that day, police officers executed a search warrant at Petitioner's home. They took samples of carpeting and carpet padding and seized various blood-spattered items. When a detective read the warrant to Petitioner, Petitioner stated, "I didn't kill nobody." The detective did not respond, and Petitioner asked, "Is this in reference to the girl that was at my house?" The detective replied, "What girl?", and Petitioner described the women who had been at his home regarding his wife's piano. Shortly thereafter, Mrs. Summerlin positively identified

the bedspread, and Petitioner was arrested. At the police station, Petitioner asked to speak with his wife and, in the presence of police officers, proceeded to make several incriminating statements.

PROCEDURAL HISTORY

On June 8, 1982, a jury convicted Petitioner of first degree murder and sexual assault. He was sentenced to death for the murder and to a 28-year prison term for the assault. On direct appeal, the Arizona Supreme Court affirmed Petitioner's convictions and sentences. State v. Summerlin, 138 Ariz. 426, 675 P.2d 686 (1983).

On March 6, 1984, Petitioner filed his first petition for post-conviction relief in state court and amended the petition on October 12, 1984. Following the evidentiary hearing on January 28, 29, and 30, 1985, the superior court denied the petition and subsequently denied a motion for rehearing. On October 1, 1985, the Arizona Supreme Court denied review. One justice dissented, stating that he would have reduced Petitioner's sentence to life imprisonment.

Petitioner filed a Petition for Writ of Habeas Corpus in this Court on April 11, 1986, and an amended petition on June 30, 1986. The Court stayed the proceedings pending the exhaustion of Petitioner's claims in state court.

On January 20, 1987, Petitioner filed his second petition for post-conviction relief in state court. The superior court summarily denied the petition on April 29, 1987, finding its only claim without merit and precluded for failure to raise it in a timely matter. The court also denied a motion for rehearing. No petition for review was filed with the Arizona Supreme Court.

Petitioner's third petition for post-conviction relief was filed on May 11, 1988. The superior court summarily denied the petition on June 23, 1988, finding the claims precluded or waived. Thereafter, the court denied a motion for rehearing, the Arizona Supreme Court denied review, and the United States Supreme Court denied certiorari.

On July 17, 1991, Petitioner filed his fourth petition for post-conviction relief, which was amended on October 17, 1991. The superior court summarily dismissed the petition on November 19, 1991, and later dismissed a motion for rehearing. The Arizona Supreme Court denied review, and the United States Supreme Court denied certiorari.

The stay of proceedings in this Court was lifted on January 27, 1995. On November 22, 1995, Petitioner filed a Second Amended Petition for Writ of Habeas Corpus ("Petition"). Respondents filed an Answer requesting summary dismissal, and Petitioner filed a Response.

CLAIMS DECIDED ON THE MERITS

In his Petition, Petitioner raises thirteen claims for relief. (File Doc. 106.)[3] Respondents contend that all but Claims 1.1, 1.2, 1.3, and 2 are procedurally defaulted. (File doc. 117 at 7-12.) As discussed infra at pages 32-35, the Court disagrees. Therefore, all of Petitioner's claims are decided on the merits.

Claim 1.1.: Petitioner was Denied Effective Assistance of Counsel at the Withdrawal of Plea Proceeding

Petitioner contends that misconduct of his counsel, Maria Regina (now Brandon), and the prosecutor, Vincent Imbordino, violated his Sixth Amendment right to effective assistance of counsel. (File doc. 107 at 13-22.) He bases his claim on the fact that Regina and Imbordino had a one-night romantic encounter four days prior to Petitioner's withdrawal from a favorable plea agreement. (Ex. W: R.T.

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3. "File doc." refers to documents in this Court's file. Exhibits A through Y are the exhibits to Respondents' Notice of Filing of State Court Record. (File doc. 17.) Exhibits AA through ZZ, AAA through MMM, and AAAA through HHHH are the exhibits submitted by Petitioner in support of his Second Amended Petition. (File Doc. 106.) Exhibits AAAA through HHHH were previously stricken by order of this Court and were not considered in the determination of this matter. (See File doc. 128.) "R.O.A." refers to the state court record on appeal. "R.T." refers to the reporter's transcripts. "M.E." refers to minute entries of the state court.

1/28/85 at 117, 192.) Petitioner alleges that the affair created a conflict of interest for Regina and resulted in her improperly allowing him to withdraw from a plea to second degree murder. For the reasons discussed below, the Court finds that Petitioner did not receive ineffective assistance of counsel.

The Sixth Amendment right to counsel includes the right to counsel free from divided loyalty. Bonin v. Calderon, 59 F.3d 815, 825 (9th Cir. 1995), cert. denied, 116 S. Ct. 718 (1996) (citing Wood v. Georgia, 450 U.S. 261, 272, 101 S. Ct. 1097, 1104 (1981)). To prevail on a claim of ineffectiveness based on a lawyer's conflict of interest, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718 (1980). This is a two-prong inquiry. First, a petitioner must prove an actual, not merely possible or theoretical, conflict. See Bonon, 59 F.3d at 826-27; Morris v. California, 966 F.2d 448, 455 (9th Cir. 1991). Second, a petitioner must show "that some [adverse] effect on counsel's handling of particular aspects of the trial was 'likely'." United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir. 1992) (Citing Mannhalt v. Reed, 847 F.2d 576, 583 (9th Cir.1988)). In the present case, the Court need not decide whether there was an "actual" conflict because Petitioner has failed to establish the second prong-- that counsel's representation was adversely affected by the alleged conflict.[4]

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4. Respondents argue that Cuyler is inapplicable to the type of conflict alleged here (i.e., a personal loyalty issue). (File doc. 117 at 13-16.) Relying on the Fifth Circuit's decision in Beets v. Scott, 65 F. 3d 1258 (5th Cir. 1995), the assert that Cuyler is limited to conflicts arising out of multiple or successive representation and that the more rigorous Strickland standard (deficient performance and resulting prejudice) must be met to prevail on this claim. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). It is unnecessary for this Court to determine whether the conflict as issue here is of the type contemplated in Cuyler because Petitioner has failed to show that his counsel's representation was adversely affected by it, let alone that the representation was deficient. Nonetheless, the Court notes that the Ninth Circuit has routinely applied Cuyler to non-multiple representation conflicts. See Bonin, 59 F.3d at 825 (listing such cases); see also Spreitzer v. Peters, 114 F.3d 1435, 1451 n. 7 (7th Cir. 1997) (declining to follow

(continued...)

On November 17, 1981, Petitioner entered into a plea agreement in which he agreed to plead guilty to second degree murder in this case and to aggravated assault in an unrelated case. The agreement specified that he would be sentenced to the maximum 21 years for the murder and to the maximum 15 years for the assault, the terms to run concurrently with each other and with a sentence for a probation violation. (Ex. Y, vol. 1: R.O.A. 29; Ex. G: R.T. 11/18/81 at 3-4, 11.) The next day, at the initial change of plea hearing, Judge Derickson discussed with Petitioner the provisions of the plea agreement and its consequences. The court also explained to Petitioner that it wanted to review the record and presentence report before deciding whether to accept the plea agreement and that Petitioner would have an opportunity to withdraw from the plea if the court rejected the stipulation for concurrent sentences. (Ex. G: R.T. 11/18/81 at 11, 14.) After Petitioner's counsel recited in detail the evidence that the state would produce at trial, the judge addressed Petitioner:

> THE COURT: The original charge is first degree murder. Are you aware of the possible punishments that are available to the Court?
>
> A. Yes.
>
> Q. What?
>
> A. Umm, gas chair, 25 to life, or natural life, by law, for first degree murder.
>
> THE COURT: Two alternatives: one is the death penalty.
>
> THE DEFENDANT: Yes, sir.

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4. (...continued)
Beets).

THE COURT: The second is life imprisonment, without the possibility for parole for 25 actual calendar years. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: With respect to the murder charge, do you believe that, because of the evidence that the State has and that it's going to present against you, that you would likely be convicted in front of a jury and, if you were convicted, you would probably suffer a greater penalty than that which is called for in this plea agreement?

THE DEFENDANT: Yes.

(Id. at 17-18.) Judge Derickson entered Petitioner's guilty pleas but deferred acceptance of the pleas until December 18, 1981, the date set for entry of judgment of guilt and sentencing. (Ex. X: M.E. 11/18/81.)

Prior to the scheduled sentencing hearing, Petitioner filed a pro per motion to withdraw from the plea agreement and a motion for substitution of counsel. (Ex. H: R.T. 12/15/81.) A hearing on the motions was held on December 15, 1981. Petitioner explained that he had just received a psychiatric evaluation report and wanted to withdraw from the plea agreement because it did not provide for him to receive psychiatric counseling. As for the motion to substitute counsel, he told the judge that he wanted to go "the medical way"and felt that the Public Defender's Office was too overloaded with cases to adequately investigate on his behalf. He further stated, "I've been telling Maria Regina, for a long time, I didn't want to accept the plea agreement and I feel I was coached into accepting a plea agreement...." (Id. at 7.) The following exchange then occurred:

THE COURT: ....I don't think you've set forth sufficient grounds, in your pleadings, to require a withdrawal of the plea of guilty, because I think we set forth all of the-we went through a long proceeding on November 18 about whether this was your

voluntary choice to plead guilty. I told you at the time that, if I couldn't, in good conscience, accept the plea agreement on the basis that was set forth-that being the stipulation that you receive concurrent time-that I would give you an opportunity to withdraw from the plea agreement.

. . . I can tell you that I am not going to accept the stipulation on the sentence.

Although today is not the sentencing date, you should be well aware that, on that ground, you have a right to withdraw from your plea of guilty and this matter can be set for trial to a jury on the various charges that are pending against you.

THE DEFENDANT: So, you're saying, on the 18th, if I want to withdraw from the plea agreement I can? Is that what you're saying?

MS. REGINA: What he's saying is that he's not going to give you the 21 years. He wants to give you more than that. So you can either go with what he gives you more than that or get out of the plea and go to trial.

(Id. at 8-9.) The judge subsequently denied both motions.

Thereafter, in an attempt to salvage the plea agreement, Regina filed a motion for change of judge on the ground that Judge Derickson was biased and prejudiced against Petitioner. (Ex. W: R.T. 1/28/85 at 114-15.) The motion was argued before Judge Broomfield on December 18, 1981, and denied. (Ex. X: M.E. 12/18/81.) Later that same day, Regina and prosecutor Imbordino engaged in a one-night affair. As a result, Regina believed she should not continue to represent Petitioner, especially since Petitioner had indicated that he wanted to go to trial. (Ex. W: R.T. 1/28/85 at 117.) Although she discussed the dilemma with colleagues at work, neither she nor Imbordino informed the judge or Petitioner. (Id. at 118-20.)

Four days later, Regina appeared with Petitioner at the rescheduled sentencing hearing before Judge Derickson. (Ex. X: M.E. 12/22/81; Ex. I: R.T. 12/22/81.) The judge again informed Petitioner that he would not accept concurrent sentences and that if Petitioner still wanted to plead guilty to second degree murder and aggravated assault, he could be sentenced up to a maximum of 38-1/2 years. Petitioner stated that he wanted to withdraw from the plea agreement, and the judge reinstated his pleas of not guilty. Petitioner also made another motion for new counsel, which was denied. (Ex. I: R.T. 12/22/81 at 9.) Thereafter, the case was transferred to Judge Riddel for trial. (Ex. X: M.E. 12/24/81.)

On December 28, 1981, Regina had arranged for a hearing before Judge McCarthy (standing in for Judge Riddel) at which she intended to move to withdraw as counsel. (Ex. W: R.T. 1/28/85 at 121-22, 133-34.) However, the judge began the hearing by asking Petitioner about his dissatisfaction with counsel. (Ex. Y, vol. 2: R.O.A. 134: App. 6: R.T. 12/28/81 at 2.) Petitioner responded that he suspected the Public Defender's Office was being pressured by the victim's employer and by a newspaper. Judge McCarthy then agreed to appoint George Klink, a private practitioner, as new counsel. (Id.) At that point, Regina decided not to mention her reason for wanting to withdraw since she had already been removed from the case. (Ex. W: R.T. 1/28/85 at 123, 134.) Subsequently, the matter was reassigned to Judge Marquardt, who ultimately presided over Petitioner's trial.

Before this Court, Petitioner argues that the Imbordino affair adversely affected Regina's representation because she did not advise Petitioner of the danger of withdrawing his plea to second degree murder and failed to try to persuade him not to do so. (File doc. 107 at 16; File doc. 120 at 8.) The record belies Petitioner's claim. At the post-conviction evidentiary hearing in state court, Petitioner testified that he had wanted Regina removed from his case because she "did not want to go the medical defense way" and instead kept pushing him into

the plea agreement.[5] (Ex. W: R.T. 1/28/85 at 210-11; see also Ex. H: R.T. 12/15/81 at 7.) Petitioner clearly understood the consequences of withdrawing from the plea and proceeding to trial, which was what he had sought to do, unsuccessfully, at the December 15 hearing. (See Ex. G: R.T. 11/18/81 at 17-18.) Once Judge Derickson indicated that he was going to reject the concurrent sentences provision and give Petitioner an opportunity to withdraw from the plea at the upcoming hearing, there was little doubt that Petitioner would do so. (See Ex. H: R.T. 12/15/81 at 8-9; Ex. W: R.T. 1/28/85 at 117; Ex. I: R.T. 12/22/81 at 8.) This is confirmed by Petitioner's substitute counsel George Klink who testified that Petitioner was unwilling to enter any plea agreement. (Ex. W: R.T. 1/28/85 at 151, 171.) While counsel's conduct with Imbordino on December 18, 1981, was an unfortunate occurrence, Petitioner has failed to present any evidence that it affected Regina's performance at the December 22 withdrawal of plea hearing. Habeas relief for this claim is therefore denied.

Claim 1.2: Petitioner was Denied Effective Assistance of Counsel at Trial

Claim 1.3: Petitioner was Denied Effective Assistance of Counsel at Sentencing

Petitioner contends that counsel George Klink was ineffective at trial for failing to assert potential psychiatric defenses. Petitioner also challenges Klink's effectiveness at sentencing, claiming he failed to present substantial mitigating evidence.

To prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). The performance inquiry is whether counsel's assistance was reasonable considering all the circumstances. Id. at 688-89, 104 S. Ct. at 2065.

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5. Petitioner explained that he wanted to go to trial so that doctors could testify to his mental problems. (Ex. W: R.T. 1/28/85 at 210-11.)

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. Regarding prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068.

In June 1981, prior to Klink's assignment as defense counsel, Petitioner was examined by two court-appointed psychiatrists, Drs. Maier Tuchler and Otto Bendheim, pursuant to Rule 11 of the Arizona Rules of Criminal Procedure. Each found him competent to stand trial and legally sane under the M'Naghten standard. (Ex. F: R.T. 7/21/81 at 4-5.) Although there was no evidence of mental disease or defect, Dr. Tuchler observed that dyslexia and illiteracy made Petitioner "functionally mentally retarded." (Ex. W: R.T. 1/28/85 at 6.) He further found that Petitioner's impulse control was extremely impaired due to an explosive-type personality disorder and that Petitioner had an anti-social personality. (Id.)

Around this same time, Dr. Leonardo Garcia-Bunuel, a psychiatrist who treated Petitioner at the Maricopa County Jail, contacted defense counsel Regina regarding a possible diagnosis of psychomotor epilepsy. Petitioner had described to Dr. Garcia-Bunuel details of the murder, particularly experiencing an intense perfume odor, and this led Dr. Garcia-Bunuel to suspect that Petitioner may have had a temporal lobe seizure at the time of the killing. (*Id.* at 46-48.) Subsequently, in August 1981, Regina arranged for neurological testing by Dr. Mark Winegard. An electroencephalogram (EEG) showed some slowing in Petitioner's posterior temporal area, but was insufficient to support a diagnosis of epilepsy. CAT scans and a second EEG performed in October 1981 were normal. As a result, Dr. Garcia-Bunuel withdrew his concerns. (Id. at 131.)

Regina also secured a psychological evaluation of Petitioner from Dr. Donald Tatro in November 1981. Although concluding there was

no evidence to support an insanity defense, Dr. Tatro found indications of an organic brain impairment borderline personality disorder, and paranoid personality disorder. (Ex. Y, vol. I: R.O.A. 95 at T2.)[6] In his opinion, Petitioner "is deeply emotionally and mentally disturbed, unaware of the motives underlying much of his behavior, and unable, because of his problems, to exercise normal restraint and control, once his highly unstable and volatile emotions are aroused." (Id.)

Ineffective Assistance at Trial

Petitioner argues that Klink's representation during trial was constitutionally deficient because he failed to independently investigate potential psychiatric defenses and failed to follow up on, or utilize, psychiatric evidence already available to him. (File doc. 107 at 23-24.) According to Petitioner, once Klink determined that Petitioner was not M'Naghten insane, he "never really considered mounting a 'state of mind' diminished capacity defense at trial in order to reduce the level of offense by negating *mens rea* . . . ."[7] (File doc. 120 at 12.)

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6. Because the copy of Dr. Tatro's report found in Exhibit Y is illegible in places, the Court obtained a more readable copy from the Clerk of the Maricopa County Superior Court which is filed as an exhibit concurrently with the present Order.

7. The Court observes that Arizona has long rejected the affirmative defense of diminished capacity. State v. Mott, 187 Ariz. 536, 540-41, 931 P.2d 1046, 1050-51, cert. denied, 117 S. Ct. 1832 (1997) (citing State v. Schantz, 98 Ariz. 200, 212-13, 403 P.2d 521, 529 (1965)); but see A.R.S. 13-703(G)(1) (proof of diminished capacity as a mitigating circumstance for sentencing). The practical effect being that a defendant cannot, during trial, put forth evidence of mental disease or defect to show that he or she was incapable of forming a requisite mental state for the charged offense. Mott, 187 Ariz. at 540, 931 P.2d at 1050; Schantz, 98 Ariz. at 213, 403 P.2d at 529. However, evidence of a defendant's character trait of impulsivity does not fall into this prohibited category. Mott, 187 Ariz. at 543-44, 931 P.2d at 1053-54; State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981).

In State v. Christensen, the defendant sought, pursuant to Rule 404(a)(1) of the Arizona Rules of Evidence, admission of expert testimony regarding his tendency to act without reflection. The Arizona Supreme Court held that it was error to exclude such testimony because "establishment of [this character trait] tends to establish that

(continued...)

Specifically, he says Klink should have presented evidence of psychomotor epilepsy and of his impulsive personality to show that the killing was not premeditated.

A. Psychomotor Epilepsy

Previous counsel Regina thoroughly investigated Dr. Garcia-Bunuel's suspicion of epilepsy. She obtained neurological testing and pursued this possible diagnosis with Dr. Bendheim, as revealed in the following letter the doctor sent to Judge Derickson in December 1981:

> We again discussed the possibility of psychomotor epilepsy, especially in view of Dr. Garcia-Bunuel's findings that this man had very vivid olfactory (smell) hallucinations preceding outbursts. I went over this whole situation again and told Miss Regina that the neurologists have been unable to find psychomotor epilepsy, although there was some slowing of the wave patterns in the temporal lobes, where psychomotor epileptic attacks usually originate.
>
> While a positive electroencephalogram, which was not obtained here, would make a positive diagnosis, an essentially negative EEG does not entirely rule out the possibility of epileptic-type seizures, and for this reason I see absolutely no harm and potentially quite a bit of benefit to place this

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7. (...continued)
appellant acted impulsively. From such a fact, the jury could have concluded that he did not premeditate the homicide." Id. at 35, 628 P.2d at 583. The holding was limited, however, in that the expert could not testify to whether the defendant was acting impulsively at the time of the offense. Id. at 35-36, 628 P.2d at 583-84.

In his Petition, Petitioner appears to confuse a "diminished capacity" affirmative defense with a strategy of presenting character trait evidence to negate premeditation. Nevertheless, he refers to Christensen in his Response, and counsel argued that applicability of that case during the post-conviction hearing in state court. (See File doc. 120 at 17; Ex. W: R.T. 1/28/85 at 219.) The Court therefore assumes that Petitioner's claims of ineffectiveness relate to counsel's failure to present evidence of impulsivity rather than the failure to pursue an affirmative defense unrecognized in Arizona.

defendant on anti-epileptic, anti-seizure type medication, even though the diagnosis has not been established.

(Ex. Y, vol. 1: R.O.A. 95 at Q2.)

During post-conviction hearings, Regina testified that she met with trial counsel Klink on two or three occasions and spent a number of hours discussing her investigative efforts, including a possible insanity defense. (Ex. W: R.T. 1/28/85 at 132.) She stated that she discussed this aspect of the case with Klink "in depth," including the examinations and conclusions of all five doctors. (Id.) Klink testified that after consulting with Regina he made a tactical decision to not pursue an insanity defense due to the lack of evidence. (Id. at 176.) As for the possible diagnosis of psychomotor epilepsy, Klink did not follow up on Dr. Garcia-Bunuel's earlier suspicion because the doctor had changed his opinion and was out of the country at the time of trial. (Id. at 175.)

In assessing an attorney's performance, a reviewing court must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Having reviewed the entirety of the record, the Court finds that Klink's performance was reasonable under the circumstances. In deciding whether to pursue evidence of Petitioner's mental state, Klink was entitled to rely on the opinions of the mental health experts who had already examined Petitioner. Hendricks v. Calderon, 70 F.3d 1032, 1038 (9th Cir. 1995). At the time, none of the doctors, including Dr. Garcia-Bunuel, were able to positively diagnose Petitioner as suffering from psychomotor epilepsy. It was thus reasonable for Klink not to investigate this possibility further. Likewise, in view of the doctors' inability to make a diagnosis, Klink's decision to forgo presenting what little evidence he had of epilepsy was certainly within the "wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066; see Harris v. Vasquez, 949 F.2d 1497, 1525 (9th Cir. 1990) ("It is also acceptable trial strategy to choose not to call psychiatrists to testify

when they can be subjected to cross-examination based on equally persuasive psychiatric opinions that reach a different conclusion."). The Court thus denies habeas relief for this claim.

B. Impulsivity

At trial, counsel's main defense theory was lack of premeditation. Klink argued to the jury that the killing may have been the result of a "violent, sudden reaction" to Brenna Bailey's visit to collect on an overdue bill. (Ex. S: R.T. 6/8/82 at 40.) Yet, he presented no evidence to support this theory, despite having the reports of Drs. Tuchler and Tatro which described Petitioner's impulsive personality and which would have been admissible under State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981). See supra note 7; Vickers v. Ricketts, 798 F.2d 369, 372 (9th Cir. 1986) ("The Arizona Supreme Court has held that the tendency to act on impulse is probative of an absence of premeditation.") (citing Christensen). At the evidentiary hearing in state court, Klink was not asked why he failed to present this evidence or whether he was even cognizant of the Christensen decision, which had been handed down more than a year before Petitioner's trial. Nonetheless, even assuming for the sake of argument that Klink's representation in this regard was deficient, Petitioner has failed to establish prejudice.

The trial court instructed the jury on both first and second degree murder and explained that a finding of premeditation differentiated the former from latter. (Ex. S: R.T. 6/8/82 at 64.) "To prove premeditation, the state was required to show only that [the defendant] had had time to reflect after forming the intent to kill; any length of time would have been sufficient, even if it was 'as instantaneous as [the time] it takes to form successive thoughts in the mind.'" Clabourne v. Lewis, 64 F.3d 1373, 1380 (9th Cir. 1995) (citing State v. Neal, 142 Ariz. 93, 97, 692 P.2d 272, 276 (1984)). In its closing argument, the State asserted that evidence of sexual assault established premeditation because Petitioner would have had to get up after assaulting the victim

to retrieve the hard, blunt object used to fracture her skull.[8] (Ex. S: R.T. 6/8/92 at 19.) The prosecutor also emphasized that the number of blows to the victim's head showed that Petitioner had had the time to reflect on his action. (Id.)

After careful review of the record, the Court finds that there is no reasonable probability the jury would have acquitted Petitioner of first degree murder had Klink introduced evidence of Petitioner's impulsive personality. The doctors would not have been allowed to testify that Petitioner was acting impulsively at the time of the murder. The testimony would have been limited to a general description of Petitioner's behavior tendencies and thus would have had only marginal probative value in determining whether Petitioner lacked premeditation at the time of the offense. See Christensen, 129 Ariz. at 35-36, 628 P.2d at 583-84. In addition, the State presented considerable evidence of sexual assault,[9] and the jury found Petitioner guilty on that charge. Furthermore, uncontroverted testimony established that the victim had been hit repeatedly and forcefully on different sides of her head.[10] Petitioner's "excessive and purposeful actions demonstrate more than

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8. Although the murder weapon was never recovered, Petitioner confessed to Dr. Tatro that he had struck the victim with a hatchet. (Ex. W: R.T. 1/28/85 at 74-75.)

9. The victim's underwear and pantyhose, torn and spattered with blood, were found in the backseat of her car, along with her shoes. (Ex. P: R.T. 6/2/82 at 154. When police discovered the body, Bailey's dress and slip were pulled up to her mid-section and she was nude from the waist down. (Id. at 166-67.) In addition, one detective observed a milky substance, which appeared to him to be seminal fluid, around her genitals. (Id. at 176, 178.) Later testing of a vaginal swab confirmed the presence of seminal fluid, and other evidence effectively eliminated Bailey's boyfriend as the source. (Id. at 114; Ex. R: R.T. 6/7/82 at 88-95, 133-36, 153-56.)

10. The medical examiner who performed the autopsy testified that there were at least five lacerations on Bailey's scalp, with some appearing to be compound (i.e., more than one blow to the same area). Ex. R. R.T. 6/7/82 at 156.) These injuries were located all over the victim's head-- on the right forehead, behind the left ear, on the top, and on the back. (Id. at 158-59.) The medical examiner further testified that several of the blows individually would have been fatal. (Id. at 163.) Additionally, there was a defensive wound on the back of the victim's right hand, indicating that she probably tried to protect her head during the assault. (Id. at 161-62.)

just a 'reactionary' homicide." State v. Summerlin, 138 Ariz. at 434, 675 P.2d at 694. Cf. State v. Lopez, 158 Ariz. 258, 263, 762 P.2d 545, 550 (1988) (nature, severity, and placement of injuries, several of which would have individually caused death, demonstrated premeditation); State v. Sellers, 106 Ariz. 315, 316, 475 P.2d 722, 723 (1970) (same). Habeas relief is denied.

Ineffective Assistance at Sentencing.

Petitioner also asserts that Klink was ineffective at sentencing for failing to investigate and present evidence of Petitioner's social and psychological history, including an incapacity to conform his conduct to the law's requirements. (File doc. 107 at 27-31.) The Court disagrees.

During the aggravation/mitigation hearing, Klink called Dr. Tatro as the sole mitigation witness. The following then occurred:

> THE COURT: All right. Come forward and be sworn, please.
>
> Your client wants to ask a question.
>
> MR. KLINK: Well, your honor, may we approach the bench?
>
> THE COURT: All right.
>
> (An off the record discussion at the bench ensued, outside the hearing of the court reporter.)
>
> THE COURT: At the request of defense counsel and his client, the client would like to have a couple of minutes to talk over the calling of this witness
>
> . . . .
>
> MR. KLINK: All right, your honor. With the consent of the defendant, the defendant has no witnesses in mitigation at this time and —

THE COURT: This will be–

MR. KLINK:--and we'll rest.

. . . .

MS. GIFFORD: Your honor, it's my understanding — at least my impression — that this is the defendant's decision that he does not wish certain witnesses to be called. Could we have that reflected on the record, perhaps, because —

THE COURT: I think it has been, and Mr. Summerlin, I'll address you directly, to make sure that—for any error that might possibly be claimed at this time—to make sure that you understand that you are facing a potential decision between either life imprisonment or the death penalty, and this is the time in which you must decide whether you present any mitigation witnesses on your behalf.

This is your entitlement. Your lawyer has told me that at this time you do not wish to, and he is telling me that you do not wish to call any mitigation witnesses. If this is correct I'll accept your decision.

But I want it to be very clear that this is the time, and only time, that you'll be able to have to do this.

So you don't even need to respond to me. You understand what I'm telling you?

THE DEFENDANT: Yes.

(Ex. T: R.T. 7/8/82 at 7-10; emphasis added.) Defense counsel subsequently clarified that Petitioner wished to rely on Dr. Tatro's evaluation, which had been appended to the presentence report. Thereafter, the State called Drs. Bendheim and Tuchler as rebuttal witnesses.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. At the post-conviction evidentiary hearing, Klink testified that he could not remember the substance of his consultation with Petitioner during the aggravation/mitigation hearing or why Dr. Tatro was not utilized as a witness. (Ex. W: R.T. 1/28/85 at 182-83.) Nevertheless, it is clear from the record that it was Petitioner who did not want the doctor to testify.[11]

Furthermore, this is not a case in which counsel, on notice that his client may be mentally impaired, failed altogether to investigate and present evidence of his client's mental condition. See Hendricks v. Calderon, 70 F.3d 1032, 1043 (9th Cir. 1995); Deutscher v. Whitley, 884 F.2d 1152, 1159 (9th Cir. 1989), vacated on other grounds, 500 U.S. 901, 111 S. Ct. 1678 (1991); Evans v. Lewis, 855 F.2d 631, 636-37 (9th Cir. 1988). Here, Klink put forth evidence that in his view showed that Petitioner's capacity to conform his conduct to the requirements of law was substantially impaired. See A.R.S. 13-703(G)(1). (Ex. W: R.T. 1/28/85 at 181.) Specifically, the sentencing court was informed, via Dr. Tatro's report, that Petitioner's emotionally and mentally disturbed condition contributed to an inability to control his behavior. (Ex. Y, vol. 1: R.O.A. 95 at T2.) In addition, on cross-examination, Klink elicited from Dr. Tuchler the opinion that Petitioner could lose control if his explosive personality was triggered. (Ex. T: R.T. 7/8/82 at 23-24.) That neither the sentencing court nor the Arizona Supreme Court found this evidence sufficient to establish the diminished capacity mitigating factor has no bearing on the reasonableness of counsel's performance.

Petitioner has also failed to establish that he was prejudiced as a result of Klink's allegedly deficient representation at sentencing.

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11. In light of Petitioner's detailed confession to Dr. Tatro, it is possible Petitioner preferred submission of the doctor's report, which had been redacted in an apparent effort to remove any reference to the confession, to the risk of a potentially damaging cross-examination.

Significantly, Petitioner does not point to any evidence of his mental condition that should have been submitted other than the possibility he suffered a psychomotor epileptic seizure at the time of the killing. However, as discussed previously, counsel's decision to forgo further pursuit of such evidence was reasonable under the circumstances. At that time, none of the experts were able to positively diagnose Petitioner as suffering from psychomotor epilepsy, and Klink was entitled to rely on their opinions. See Dyer v. Calderon, 122 F.3d 720, 736 (9th Cir. 1997); Hendricks, 70 F.3d at 1038. Even at the post-conviction evidentiary hearing, Dr. Garcia-Bunuel could not affirmatively opine whether Petitioner had experienced an epileptic seizure at the time of the killing.[12] Moreover, this possible diagnosis was brought to the sentencing court's attention through Klink's cross-examination of Dr. Bendheim during the aggravation/mitigation hearing. (Ex. T: R.T. 7/8/82 at 17-19.)

As for Klink's failure to interview Petitioner's family members or otherwise investigate Petitioner's background, Petitioner has again failed to establish that such efforts would have changed the sentencing outcome. The state court conducted a full and fair fact-finding hearing

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12. Dr. Garcia-Bunuel testified as follows:

> Mr. Summerlin may claim that he never sexually assaulted the victim that he killed. If Mr. Summerlin is telling the truth in that respect, then my answer to the question would be, essentially, unqualified yes, he almost certainly acted as a result of the temporal lobe seizure.
>
> If Mr. Summerlin is not telling the truth—did not tell me the truth and, in fact—and I have no way of establishing that—did sexually assault the victim prior to the killing, then my answer would be that it was not very likely he had a temporal lobe seizure at that time
>
> . . . .
>
> . . .
>
> Clearly, one would have to assume that if there was a sexual assault the victim would have resisted, it would not have lasted a fraction of a second, and it would have been terminated. The murder that followed would have had a different motivation and cause then.

(Ex. W: R.T. 1/28/85 at 57-58.)

into this claim of ineffective assistance of counsel.[13] Yet, Petitioner produced no new mitigating evidence. In addition, much of the information Petitioner now claims was never presented in mitigation was in fact contained in Dr. Tatro's report, including Petitioner's learning disabilities and organic brain dysfunction, as well as his troubled childhood and feelings of being unloved and unwanted by his mother. (See Ex. Y, vol. 1: R.O.A. 95 at T2-Z2.) Thus, even assuming Klink's failure to investigate Petitioner's social history fell outside the wide range of reasonable assistance, Petitioner has not met his burden of proving prejudice. Petitioner is not entitled to habeas relief.

Claim 1.4: Cumulative Errors of Counsel Prejudiced Petitioner.

Petitioner next asserts that the combined impact of alleged deficiencies in counsel's representation prejudiced his defense. As already discussed, however, Petitioner has failed to show, in most of his ineffective-assistance-of-counsel claims, that counsel's performance was deficient, let alone prejudicial. This claim is therefore denied. Cf. Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995) (petitioner prejudiced by cumulative impact of eleven deficiencies, eight of which were undisputed).

Claim 2: Petitioner's Due Process Rights were Violated by the Trial Court's Incompetence/Impairment

In 1991, Judge Marquardt pled guilty to a felony involving marijuana and admitted suffering from an addiction to the drug. Petitioner contends that this admitted drug use establishes Judge Marquardt was incompetent to preside over Petitioner's pre-trial, trial,

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13. The Court made this finding in its July 18, 1996 Order granting Respondents' Motion to Strike Petitioner's Exhibits AAAA through HHHH. (See File doc. 128.)

sentencing, and post-conviction proceedings.[14] (File doc. 107 at 33-67.) Although he points to several passages in the record that in his view evidence impairment, Petitioner urges the Court to look beyond the record, conduct an evidentiary hearing into the extent of Judge Marquardt's drug dependency, and evaluate this claim as if it were one of judicial bias. See, e.g., Tumey v. Ohio, 273 U.S. 510, 532, 47 S. Ct. 437, 444 (1927) (pecuniary interest in outcome of judgment); Scott v. United States, 559 A.2d 745 (D.C.App. 1989) (appearance of impropriety). The Court declines to do so.[15]

In reviewing a claim of judicial incompetence, the appropriate inquiry is "whether the state trial judge's behavior rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution." Duckett v. Godinez, 67 F.3d 734, 740 (9th Cir. 1995). Petitioner points to several parts of the record to substantiate his allegation that Judge Marquardt's ability to "perceive, comprehend, reason, and judge" was impaired. (File doc. 107 at 39-62.) Specifically, he cites to the judge's need for clarification of the facts during a pre-trial suppression hearing (see Ex. N: 5/11/82 at 37-38), alleged mistakes during voir dire (see Ex. O: 6/1/82 at 22, 32-34), reversal of an evidentiary ruling (see Ex. Q: 6/3/82 at 38-40), "misleading" advice regarding mitigation evidence (see infra Claim 5), allegedly erroneous aggravating and mitigating findings (see File doc. 107 at 46-55), and failure to find, during post-conviction proceedings, that counsel had been ineffective at trial and sentencing (see id. at 55-62). This Court carefully reviewed the entire state court record, with an emphasis on the passages referenced by Petitioner. None demonstrate that Judge Marquardt was impaired or that Petitioner was denied a fundamentally fair trial. This claim is wholly without merit and is therefore denied.

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14. Respondents concede that Judge Marquardt used marijuana during the relevant time period. (File doc. 117 at 31.)

15. Petitioner's request for funds to investigate the nature and extent of Judge Marquardt's drug usage was previously denied by the Court in its September 27, 1995 Order. (See file doc. 93.)

Claim 3.1: Petitioner was Entitled to a Jury Determination of the Factual Issues Constituting Aggravating Factors

Arizona Revised Statutes § 13-703(B) provides that the determination of aggravating factors shall be heard "before the court alone" without a jury. Petitioner argues that the Sixth, Eighth, and Fourteenth Amendments require a jury determination of aggravating factors because such factors are essentially elements of first degree murder. The United States Supreme Court rejected this same argument in Walton v. Arizona, 497 U.S. 639, 647-49, 110 S. Ct. 3047, 3054-55 (1990). Claim 3.1 is denied.

Claim 3.2: Arizona's Death Penalty Statute Imposes an Improper Burden and Standard of Proof at Sentencing.

This claim lacks merit. In Walton v. Arizona, 497 U.S. 639, 649-51, 110 S. Ct. 3047, 3055-56, the United States Supreme Court rejected the petitioner's argument that the Arizona death penalty statute violates the Eighth and Fourteenth Amendments because it imposes on defendants the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency. Habeas relief is therefore denied.

Claim 3.3: The Aggravating Factor of Especially Heinous, Cruel, or Depraved is Unconstitutionally Broad and is Unconstitutional as Applied to Petitioner.

Petitioner argues that the Arizona Supreme Court has failed to construe the "especially heinous, cruel, or depraved" aggravating factor in a manner that adequately channels the sentencer's discretion. However, the Unites States Supreme Court has held otherwise. See

Richmond v. Lewis, 506 U.S. 40, 50-51, 113 S. Ct. 528, 536 (1992); Walton v. Arizona, 497 U.S. 639, 652-55, 110 S. Ct. 3047, 3056-58 (1990). Therefore, Petitioner's argument has no merit.

Petitioner also asserts that the especially heinous, cruel or depraved factor, A.R.S. § 13-703(F)(6), was arbitrarily applied in his case. Whether a state court correctly applied an aggravating factor to the facts is a question of state law. Lewis v. Jeffers, 497 U.S. 764, 780, 110 S. Ct. 3092, 3102 (1990). Therefore, federal habeas review is limited to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation. Id. The appropriate inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact"could have made the finding beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) (emphasis in original). A habeas court faced with a record of historical facts which supports conflicting inferences must presume (even if it does not appear in the record) that the trier of fact resolved any such conflicts in favor of the prosecution. Id. at 326, 99 S. Ct. at 2793.

In finding the (F)(6) aggravating factor in the present case, the sentencing court stated the following in its Special Verdict:

> The killing was cruel. The victim received a defensive blow to her right hand. The victim suffered pain and mental terror during and prior to this blow. She experienced mental terror while being raped by the defendant and obviously experienced mental terror after the rape and during her murder, as she tried to defend herself.
>
> The killing was also heinous and depraved. Focusing on defendant's mental state, the evidence showed he literally crushed the victim's skill from all sides after he raped her. this was a heinous and depraved murder.

(Ex. Y, vol. 1: R.O.A. 92 at 1-2.) The Arizona Supreme Court independently reviewed the sentencing court's findings and agreed that

the murder was committed in both an especially cruel and especially heinous or depraved manner. State v. Summerlin, 138 Ariz. 426, 436, 675 P.2d 686, 696 (1983).

Under Arizona law, cruelty is defined as the pain and suffering, including mental distress, of a conscious victim prior to death. State v. Amaya-Ruiz, 166 Ariz. 152, 177, 800 P.2d 1260, 1285 (1990). Viewing the evidence in a light most favorable to the State, a rational fact-finder could find beyond a reasonable doubt that the victim suffered both mental and physical pain as a result of being raped and bludgeoned by Petitioner.

Heinousness and depravity focus on the defendant's state of mind and can be satisfied by a showing that the defendant inflicted gratuitous violence on the victim beyond that necessary to kill, needlessly mutilated the victim's body, relished the murder, or senselessly killed. State v. Gretzler, 135 Ariz. 42, 52, 659 P.2d 1, 11 (1983). Helplessness of the victim is also a factor that can be considered. Id. Viewing the evidence in a light most favorable to the State, a rational fact-finder could find beyond a reasonable doubt that the excessive number of blows to the victim's head constituted gratuitous violence and needless mutilation, that the victim was helpless, and that the killing was senseless. Petitioner is not entitled to habeas relief on Claim 3.3.

Claim 3.4: Arizona's Death Penalty Statute is Impermissibly Mandatory in Nature.

Arizona Revised Statutes § 13-703(E) provides that the trial court "shall impose" the death penalty if one or more aggravating circumstances are found and mitigating circumstances are found insufficient to call for leniency. Petitioner claims that the statute creates a mandatory "presumption of death" and does not permit the sentencer to decide the appropriateness of the death penalty in an individual case, thus violating the Constitution. This precise claim was rejected by the United States Supreme Court in Walton v. Arizona, 497

U.S. 639, 651-52, 110 S. Ct. 3047, 3056 (1990). Habeas relief on this ground is denied.

Claim 4: Petitioner was Denied a Fair Opportunity to Present Mitigation.

Petitioner asserts that counsel's ineffectiveness at sentencing constitutes an independent due process violation in that Petitioner was deprived of the opportunity to present mitigating evidence—in particular, psychiatric testimony regarding his mental state. For the reasons discussed regarding Claim 1.3, this claim lacks merit and is denied.

Claim 5: The Trial Court Improperly Advised Petitioner Regarding the Consequences of Not Presenting Mitigation Evidence.

As already discussed in relation to Claim 1.3, Petitioner chose to not present mitigation witnesses at the aggravation/mitigation hearing. In response, the trial court stated:

> I think probably it would also be fair for me to tell you, just to make sure we understand each other, that under the statutes and under the code that I operate under in Arizona, there are a list of aggravating factors, and a list of mitigating factors that have to be determined.
>
> Those factors—certain aggravating factors have been presented to me by the State of Arizona. If I find any one of those aggravating factors to exist—if I find an absence of—or no mitigating factors—then I'm authorized to give the maximum penalty, which can be the death penalty.

(Ex T: R.T. 7/8/82 at 10.) Petitioner argues that this was incorrect and misleading advice since A.R.S. § 13-703(E) dictates that the trial court "shall impose" the death penalty if one or more aggravating circumstances are found and mitigating circumstances are found

insufficient to call for leniency. Petitioner, however, fails to allege how these remarks amounted to a violation of federal law. See Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 480 (1991) ("[I]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). Furthermore, he makes no claim that he was in fact misled or that his attorney failed to advise him of the consequences of not presenting sufficient mitigating evidence. Moreover, the trial court emphasized the importance of presenting mitigation evidence if Petitioner hoped to avoid the death penalty. Petitioner's claim is denied.

Claim 6: The Trial Court Improperly Considered a Victim Impact Statement

Claim 7: The Trial Court Improperly Considered a Presentence Report that Contained Irrelevant and Inadmissible Statements

Petitioner argues that a victim impact statement, letters from the victim's relatives and friends, and a petition with approximately 500 signatures constituted irrelevant sentencing information that violated his rights under the Eighth Amendment.[16] Petitioner also complains that the presentence report contained inadmissible speculation and hearsay. Specifically, the probation officer who prepared the

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16. Relying on Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529 (1987), Petitioner challenges all of the victim-related evidence, including the impact of the crime on the family, opinions about the defendant, and sentencing recommendations. He acknowledges, however, that Booth's per se bar on victim impact evidence was overturned by the United States Supreme Court in Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609 (1991). Nevertheless, the admission of family members' opinions and characterizations about the crime, the defendant, and the appropriate sentence remains constitutionally impermissible. Id. at 830 n.2, 111 S. Ct. at 2611 n.2.

presentence report included in it her opinions regarding the crime. The following is an excerpt:

> The instant offense was a senseless and brutal attack of an innocent young woman whose only mistake, if any, was being in the wrong place at the wrong time. What mentel [sic] terror and trauma the victim felt throughout her ordeal, will never be known, however, any reasonable individual can assume it was beyond comprehension. Her attempts to struggle for her life ended as the defendant viciously and repeatedly beat her head with a blunt instrument.
>
> . . . .
>
> This writer is of the opinion the defendant represents a grave threat not only to women, but to all of society. This writer further believes that the taking of a human life is the ultimate crime and in the manner in which it occurred, the defendant should be dealt the most severe penalty possible.

(Ex. Y, vol. 1: R.O.A. 95 at 7-8.)

Absent proof to the contrary, state courts are "presumed to know the law and to apply it in making their decisions." Walton v. Arizona, 497 U.S. 639, 653, 110 S. Ct. 3047, 3057 (1990). See also Jeffers v. Lewis, 38 F.3d 411, 415 (9th Cir. 1994) ("[W]e presume state courts follow the law, even when they fail to so indicate."); Paradis v. Arave, 20 F.3d 950, 956-57 (9th Cir. 1994) (petitioner failed to show that the trial judge relied on hearsay statements in arriving at the sentencing decision); Gerlaugh v. Lewis, 898 F. Supp. 1388, 1423-24 (D. Ariz. 1995) (same). Petitioner has failed to show that the trial court actually relied on inadmissible or irrelevant evidence when it imposed the death sentence. The court read the presentence report, but its findings do not indicate that it based the sentence on any of the information complained of by Petitioner. (See Ex. Y, vol. 1; R.O.A. 92; Ex. U: R.T. 7/12/82 at 9-12). Claims 6 are 7 are denied.

PROCEDURAL BAR

Before a federal court may review a petitioner's claims on the merits, the petitioner must have presented in state court every claim raised in the federal habeas petition. This is referred to as the "exhaustion requirement." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546 (1991); Rose v. Lundy, 455 U.S. 509, 102 S. Ct. 1198 (1982). To properly exhaust state remedies, the petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner. Castille v. Peoples, 489 U.S. 346, 351, 109 S. Ct. 1056, 1059 (1989). A claim is "fairly presented" if the petitioner has described the operative facts and legal theories on which the claim is based. Anderson v. Harless, 459 U.S. 4, 6, 103 S. Ct. 276, 277 (1982); Picard v. Connor, 404 U.S. 270, 277-78, 92 S. Ct. 509, 513 (1971).[17]

If there are claims which have not been raised previously in state court, the federal court must determine whether the petitioner has state court remedies currently available to him. If there are none, he has "technically" exhausted the claims. Jackson v. Cupp, 693 F.2d 867, 869 (9th Cir. 1982) (citing Engle v. Isaac, 456 U.S. 107, 125 n.28, 102 S. Ct. 1558, 1570 n.28 (1982)). However, the federal court may not review the claims on the merits unless the petitioner demonstrates legitimate cause and actual prejudice to excuse his failure to raise the claims in state court, or shows that a fundamental miscarriage of justice would result. Similarly, if a claim was raised in state court but found precluded or waived, the federal court will not hear the claim absent a showing of cause and prejudice or fundamental miscarriage of justice. Sawyer v. Whitley, 505 U.S. 333, 338, 112 S. Ct. 2514, 2518 (1992); Coleman, 501 U.S. at 735 n.1, 111 S. Ct. at 2557 n.1; Engle, 456 U.S. at 129, 102 S. Ct. at 1572-73.

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17. Resolving whether a petitioner has fairly presented his claim to the state court, thus permitting federal review, is an intrinsically federal issue which must be determined by the federal court. Wyldes v. Hundley, 69 F.3d 247, 251 (8th Cir. 1995); Harris v. Champion, 15 F.3d 1538, 1556 (10th Cir. 1994).

In the present case, Respondents argue that Claims 1.4, 3.1, 3.2, 3.3, 3.4, 4, 5, 6, and 7 are procedurally barred in federal court because the state court found them procedurally defaulted when it ruled on Petitioner's third petition for post-conviction relief.[18] (File doc. 117 at 7; Ex. UU: M.E. 6/23/88.) In Harris v. Reed, 489 U.S. 255, 263-64, n.10, 109 S. Ct. 1038, 1043-44, n.10 (1989), the United States Supreme Court held that federal courts will recognize a procedural default if the state court "clearly and expressly" states that its judgment rests upon a procedural bar, even if the state court makes an alternative ruling on the merits. See also Carriger v. Lewis, 971 F.2d 329, 333 (9th Cir. 1992) (holding claim was procedurally defaulted when state court denied claim on procedural grounds and alternatively on the merits). However, if the state court did not actually rely independently on the bar, but instead rejected Petitioner's claim on its merits or on the combined weight of Petitioner's default and the claim's merits, a federal court "implies no disrespect for the State by entertaining the claim." County Court of Ulster County, N.Y. v. Allen, 442 U.S. 140, 154, 99 S. Ct. 2213, 2223 (1979). See also Siripongs v. Calderon, 35 F.3d 1308, 1316-17 (9th Cir. 1994) (state court order failed to independently rely on state bar when it denied petition "both for reasons of procedural default and on the merits" and did not identify any particular procedural rule that completely barred any of the petitioner's claims).

In denying Petitioner's third petition, the state court ruled as follows:

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18. Claim 5 was initially raised as the sole issue in Petitioner's second petition for post-conviction relief. (Ex. 11.) The trial court ruled that it was precluded for failure to raise it within one year of the date of mandate. (Ex. KK: M.E. 4/29/87.) The court further found that the claim lacked merit. (Id.) The court's preclusion ruling was based presumably on A.R.S. § 13-4232(A)(4), cited in the State's Response to Petition for Post-Conviction Relief. (Ex. JJ at 2.) Petitioner did not petition the Arizona Supreme Court for review. Subsequently, section (A) (4) of A.R.S. § 13–4232 was declared unconstitutional. State v. Bejarano, 158 Ariz. 253, 762 P.2d 540 (1988); State v. Fowler, 156 Ariz. 408, 752 P.2d 497 (App. 1987). Petitioner then re-raised Claim 5 in his third petition for post-conviction relief. (Ex. RR.)

> Defendant's Third Petition for Post-Conviction Relief is summarily denied. For the reasons stated in the State's Response and adopted by this Court, the issues raised are precluded or waived.

(Ex. UU: M.E. 6/23/88.) The State's Response, however, does not add clarity to the court's ambiguous ruling. Specifically, the State first argued that some of the claims were precluded because they had been previously adjudicated on the merits either in the first petition for post-conviction relief or on direct appeal. (Ex. SS at 3-4.)[19] It subsequently stated that "all the issues raised in the present petition" are waived "because each issue existed at the time of the appeal, but was not raised." (Id. at 5; emphasis in original.) The trial court's wholesale adoption of the State's internally-inconsistent Response does not provide a clear basis for finding that the judgment rests upon procedural default grounds. See Ceja v. Stewart, 97 F.3d 1246, 1252 (9th Cir. 1996) (state court did not clearly base ruling on independent and adequate state grounds when it adopted state's mixed arguments of preclusion and waiver). Therefore, the relevant claims have been decided on the merits by this Court.

Respondents also contend that Claims 1.4, 3.1, 3.2, 3.3, 3.4, 4, 5, 6, and 7 are not "exhausted" because the Arizona Supreme Court summarily denied review of the trial court's ruling on the third petition for post-conviction relief. (File doc. 117 at 9-10; Ex. AAA.) They assert that because the trial court's procedural default rulings were left "intact," the merits of the claims have never been "fairly presented" to the state's highest court. The Court disagrees. Exhaustion does not require that the state's highest court rule on a claim's merits. Where state supreme court review is discretionary, a petitioner need only seek such review in order to exhaust state remedies. Roberts v. Arave, 847 F.2d 528, 529-30 (9th Cir. 1988). The Court further disagrees with Respondents' assertion that Claim 1.4 was not raised in any state court.

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19. If claims are held "precluded" because they already have been decided on the merits, there is no bar to federal habeas review.

(File doc. 117 at 10.) It was included in Petitioner's third petition for post-conviction relief. (See Ex. RR at 9-12.)

CONCLUSION

All of Petitioner's claims are denied on the merits. In addition, the Court finds that Petitioner is not entitled to an evidentiary hearing.

Accordingly,

IT IS ORDERED denying with prejudice Petitioner's Petition for Writ of Habeas Corpus and all amendments thereto **[file docs. 1, 23, 106].**

IT IS FURTHER ORDERED vacating the stay of execution previously entered by the Court **[file doc. 13].**

IT IS FURTHER ORDERED that the Clerk of the Court send copies of this Order to all counsel of record.

IT IS FURTHER ORDERED that the Clerk of the Court file Dr. Tatro's 7-page report (received from the Clerk of the Maricopa County Superior Court) as an exhibit to this case.

Dated this 31 day of October, 1997.

s/_____
Rosyln O. Silver
United States District Court Judge

Copies to all counsel of record.

APPENDIX C

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

Clerk of the Court
Mail Distribution Center
Received: Feb 1 1985
Processed: Feb 1 1985
Vivian Kringle, Clerk

4-60480 1-30-85 HON. PHILIP W. MARQUARDT S. Nielsen
Div. Date Judge or Commissioner Deputy
No. CR125325 CR119502

STATE OF ARIZONA — Attorney General by Wayne Ford

VS.

WARREN WESLEY SUMMERLIN — Mark Meltzer

Director-Arizona Department of Corrections

10:12 a.m. Evidentiary hearing continues from January 29, 1985. State is represented by Assistant Attorney General, Wayne Ford. Defendant is present with Counsel, Mark Meltzer.

Court Reporter: Steven C. Toth, Jr.

Vince Imbordino is sworn and testifies.

The witness is excused.

Warren Wesley Summerlin is recalled and testifies further.

10:49 a.m. Court stands at recess.

11:04 a.m. Court reconvenes with Defendant and respective Counsel present.

Court Reporter: Steven C. Toth, Jr.

Counsel present argument to the Court.

IT IS ORDERED taking this matter under advisement.

11:18 a.m. Proceedings concluded.

FILED: Work Sheet.

LATER: This matter having been under advisement, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The conduct of previous Counsel for the Defendant and Counsel for the State did not prejudice the Defendant.

2. The substitution of the Attorney General as prosecutor did not deny the Defendant a fair trial.

3. The Defendant was not denied effective assistance of Counsel at trial or at sentencing; more specifically,

a. The defense theory was not inconsistent.

b. Defense Counsel took appropriate steps to counter the evidence of seminal fluid.

c. There was no basis for a defense of insanity. Counsel pursued such a defense to the extent reasonable in the circumstances.

d. Counsel presented all the mitigating evidence known at the presentence hearing.

4. The Defendant has failed to demonstrate any prejudice resulting from either issue raised in the Petition for Post-Conviction Relief.

CONCLUSIONS OF LAW

The Court finds that the Defendant has failed to demonstrate less than minimal competence and a reasonable probability of a different result. State v. Lee, ___ Ariz. ___, 689 P.2d 153 (1984).

The Court further finds that the Defendant has failed to prove the allegations of fact by a preponderance of the evidence. Rule 32.8, Ariz. R.Crim.P.; State v. Ramirez, 126 Ariz. 464, 616 P.2d 924 (Ct. App. 1980).

IT IS THEREFORE ORDERED that the Petition for Post-Conviction Relief is denied.

Formal written Order signed by the Court this date.

s/_____
HON. PHILIP W. MARQUARDT
JUDGE OF THE SUPERIOR COURT

APPENDIX D

DONALD F. TATRO, PH.D.
2302 N. 36th Street • Suite 105 • Phoenix, Arizona 85008 • 955-3109

Maria Regina, Attorney
Maricopa County Public Defender's Office
132 S. Central Ave., 2nd Floor
Phoenix, Arizona 85004

November 21, 1981

Dear Ms. Regina:

As per your request, I carried out a mental status examination of the defendant, Warren Summerlin, who is being held at the Maricopa County Jail on charges of first degree murder. Mr. Summerlin was seen at the jail on November 19, 1981.

According to police reports, Mr. Summerlin is alleged to have murdered a female employee of a finance company who visited his home to try to collect on an overdue loan payment. The reports indicate that after striking her a fatal blow to the head, he attempted to conceal the crime by putting the victim's body in the trunk of her car and leaving the car parked in a lot outside a grocery store. The victim's schedule of visits for the day of the crime, an anonymous phone call to the police, implicating the defendant, and the blanket in which the corpse had been wrapped all pointed to Mr. Summerlin as the likely perpetrator of the crime and led to his arrest and indictment.

[INFORMATION REDACTED]

Behavioral Observations

Mr. Summerlin came to the interview room carrying a large folder full of police reports of his crime, various legal documents, and written materials expressing his own ideas about how his defense should be conducted. Later in the interview, he explained that he was concerned that his defense was not being handled properly and that, based on his

construction of the facts, he thought he could develop a defense based on a claim of insufficient evidence to convict.

From the outset his behavior vacillated from extremes of distrust and reluctance to talk to an almost careless disregard for what he was saying and the probable personal consequences. It was as if he felt compelled to expose himself and, only from time to time, thinking better of what he was saying, the need to be more distrusting, wary, and defensive. The first thing he did upon entering the room was to question my identity and demand some kind of proof that I was who I was representing myself to be. Even after I provided him with identification, which, by the way, he could not read due to a learning disability, he refused to believe that I was not a "plant". Nonetheless, he agreed to talk to me, and then went on in a manner that can only be described as recklessly open about the circumstances surrounding the crime with which he is charged. Every once in awhile, however, it appeared that he was able to get control over his rush to reveal himself long enough to consider the implications of what he was saying, at which points, he would become tense and begin to reassert his conviction that I was not a doctor, but somebody sent in to entrap him.

In spite of his periods of openness, it was difficult to interview and test Mr. Summerlin. His manner was very tense and he communicated an extreme sensitivity to some subjects. At many points during the interview it was like walking a tightrope - trying to keep a balance between the need to elicit information from the defendant and the need to avoid pressing him in certain areas that threatened to disrupt him emotionally. There were times, for example, when the conversation caused him to react with intense emotionality, bringing tears to his eyes, flushing his face, and stimulating agitated bodily movements. It was necessary at these times to back off for several minutes, giving him sufficient time to regain control of himself, and, for quite awhile thereafter to proceed with caution, lest his still echoing feelings be re-aroused. During the moments when he was trying to regain self-composure, he would grip the edge of the table, as if trying to hold onto something stabilizing, and literally gasp for air. Silence was the only appropriate response as such moments. When he was subsequently able

to resume conversation, he made it clear that he felt that such emotional reactions - to the extent that they involved feelings of hurt, unhappiness, pain, disappointment, longing, or any of the softer emotions - were "weaknesses" on his part, weaknesses that he cannot tolerate and which typically force him into displays of hostility and aggression.

None of these reactions, by the way, were aroused by conversation around the subject of the crime with which he is accused, but rather by discussion of his experiences with his parents as a child and the feelings connected with them. Subjects related to his experiences with people who have hurt him emotionally or contributed to his sense of inadequacy and failure as a human being, in general, and as a man, in particular, also aroused him to such reactions. At one point, he became very tense and shaky in response to my reaching out to touch his arm comfortingly during a moment of emotional upset. He stiffened as if I had punched him, grew very tense, and said ominously, "Don't do that." Apparently, any kind of physical contact from another male is very threatening to him.

Background Information

Mr. Summerlin was born in Miami, Florida, where he lived until he was 17 years of age. He was one of two children born to the marriage of his parents. He has a sister, who is a year younger than he.

His earliest memory is of his father being sent off to jail when he was just six years old. According to him, his father was talked into participating in a bank robbery by some acquaintances, and, later, when his wife, the defendant's mother, turned him in to the police, and he refused to implicate the people who took part with him in the robbery, he was sentenced to 25 years in prison. This was one of the painful ____ that caused the defendant to react with intense, almost overwhelming emotionality. He could not get much into his feelings of closeness to his father, and his feelings of loss when he went off to prison, or his feelings of hostility towards his mother for betraying his father to the police.

He is much impressed with the fact that his life has in many ways paralleled the life of his father, suggesting that much of what has happened to him was destined to happen, by reasons of heredity and identification. He said, "You could call it a coincidence, I guess, but my life has been so close to my Dad's - age as he is now when he went off to serve 25 years in prison, that, like his father's wife, his wife had turned him in to the police for a serious crime, and, also, like his father, he is being removed from the close relationship he had with a six-year-old son (actually, stepson). "It's almost like a patter," he said, "like it was all meant to happen this way."

When asked about the qualify of his childhood, he replied, "What I remember is different than what my mom remembers. She thinks I had a good childhood. I don't think so." Most he recalls is a remark that his mother alleged his father to have made before going off to prison, something to the effect that it would have been easier on her if she only had one child to raise instead of two. This remark, in his mind, set the tempo of his childhood, since it was his perception from that point on that he was the unwanted child. Where he was always doing something wrong in his mother's eyes (and in his own eyes, too), where, because of his reading disability, he was not able to succeed outside of special education classes in school, and where he was always the object of his mother's _____ attentions, his sister never did anything wrong, did well in school, and was never punished by his mother. "I was always in one trouble or another and getting a whipping, but she was always a goody-goody," he said, displaying a resentment that persists this far into his adult years.

His first extreme emotional reaction in the interview came when he recalled an incident in which he was accused by his mother of taking the keys to her car. He protested his innocence, but she would not listen. she got a hickory switch and gave him a very severe beating ("She was always beating me," he said). Later, when she discovered that she had mislaid her keys, she came to his room (his "small room" compared to his sister's "big room") and tried to apologize. "She whipped me until I had welts all over my body," he said, "Then she opened the door and said she was sorry. Saying she was sorry didn't

heal me," he said with a tone of deep hurt. When I suggested that the wounds of that event had still not healed, tears rose to his eyes, his face reddened, and he began to tremble and gasp, as if trying to catch a breath. He said, "No, they haven't," and then became so overcome that he could not go on.

Feeling that he was not wanted by his mother, unable to prove himself other than a failure in school, and seeing himself as always coming out on the losing side of the rivalry that existed between him and his sister, he accepted the notion that he was even more like the lawbreaking father whom he remembered as having favored her. Starting when he was about seven, he began running away from home and getting into trouble. He spent quite a bit of time in juvenile detention facilities as a youngster, which he claims to have liked better than living at home. "I felt I had it better in the juvenile home than I did at home. They had things like movies, arts and crafts, and things, and that kept motivating me to come back," he said.

It was during his stays in juvenile facilities that he began to develop the idea that any display of soft, human, empathetic emotion was a weakness. "They taught me that," he said. Reflecting back on the difficulties he had getting along with his mother and sister while growing up, he said, "For awhile here, recently, I been talking to a preacher, and trying to forgive them and everybody." But, after a moments pause, his early learning presented itself, and he added, "But forgiveness is a weakness which I will overcome." He then described how his mother, when he was 17 and being charged with auto theft, went to court and, instead of coming to his aid, advised that the best thing for him would be "a very strict incarceration". He was reminded of what he perceived as his mother's treachery in turning his father in to the police.

Mr. Summerlin dropped out of school in the 7th grade, after having experienced several frustrating years not being able to learn how to read. At some point, his problem was diagnosed as dyslexia, a learning disability that is usually associated with an organic brain dysfunction. He claims that his inability to read and his failure experiences in school

did not bother him, that he never thought about it very much, but based on several comments he made, indicating that these failure experiences entered very strongly into his feelings of being unloved and rejectable, they bothered him a great deal mor than he was able or willing to admit to himself. He still is unable to read or write, but feels that he has compensated for this by developing an extraordinarily good memory. He said, "I got a real good memory, because I have had to memorize everything all my life."

Spending a lot of his juvenile years either locked up in detention or out on the streets, running away from home, he proved a good student when it came, first, to survival skills, and, later, to making money by stealing from others. At first I started breaking into houses for food, just to stay alive," he said, "but then the guys I knew said, "Why just food?" The other guys taught me the ropes - how to go in and get money, guns, jewelry, and other kinds of valuable junk."

He did work from time to time largely as a construction laborer. He seemed somewhat proud of the fact that he has acquired a number of construction-type skills along the way: roofing, maintenance work, plumbing, electrical wiring, landscaping, sprinkler installation, and welding. He picked up most of these skills outside of fail, some of them inside. Since the age of 17, he has spent most of his life behind bars. From age 18 to 22, he was in prison on an auto theft conviction. From 23 to 28, he was in prison for possession of firearms and breaking and entering. He was paroled to Arizona from Florida, via the Interstate Compact, and, from what he reported, has spent additional time in jail on petty charges, such as being in possession of marijuana.

He was married for the first time when he was 16. This marriage only lasted one year, coming to an end when he was convicted and sentenced on the auto theft charges. He reports that the marriage was very tempestuous, and that his wife started playing around with other men, becoming pregnant in the process, when she discovered that, while he was a common laborer by day, he was also a thief by night, and that he was sexually sterile. He seems to think that her decision to start "screwing around with somebody else" was prompted primarily by

her dissatisfaction with his condition of sterility. He alluded to this in such a way as to make it sound like he, himself, thought it a defect, and as if it interfered, in some way, to comport himself in a way that is sexually satisfying to women.

He got married for the second time after coming to Arizona, about two years ago. He said that their first year together "went by really nice", but by the second year, he began to realize that his wife had a drinking problem. He said, "I don't drink hardly at all, and I don't care for honky-tonkin' around, but that's what she likes. She was all the time complaining about money, but then spending it going to bars." He said that this, in addition to his growing awareness of her tendency to tell him lies, had been a source of considerable conflict between them for the past year, leading them almost to the point of separation. "Since I been in here, I found out that she's an habitual liar," he said, pronouncing her a "traitor" for having informed on him to the police. He said that he believed that the silent Witness phone call that gave the police an anonymous tip about his involvement in the murder came from his mother-in-law, acting on behalf of his wife.

Findings and Conclusions

In addition to the interview, I administered the Bander Visual Motor Gestalt Test, the Sentence Completion Test, and the Figure Drawing Test, all that I sensed that Mr. Summerlin's tense, volatile manner could tolerate at the time.

The Bender Gestalt Test contained several indicators that are usually associated with the presence of organic brain dysfunction, which is consistent with the reports of his having had lifelong problems with learning to handle written materials while giving evidence of average intellectual capacity in other areas. An organic brain disorder would also be consistent with his history of impulsive overreactions to emotionally arousing events, as it is often the case that people with such disorders manifest considerable difficulty in escaping from the pull of stimuli that capture and dominate their attention and behavior.

Personality tests indicate the presence of severe, deep-seated personality conflicts going back to early childhood. Actually, the basic problem appears to be that Mr. Summerlin's early childhood experiences were so full of rejection, hurt, and feelings of disappointment in relation to his parents, that he failed to achieve the kind of basic identification with parents that makes the difference between a person's being able to trust and feel close to people or not being able to trust others enough to permit closeness and the development of mutual understanding. If he had not had some measure of warmth and closeness in his early years, he might have been more totally paranoid in his relationships with people, continuously holding himself apart from the threat that they represent to him. It looks, however, as if he got just enough feeling of affection and approval as a child to make him believe that satisfying human relationships are possible, to create a hunger for close, gratifying relationships, but nor enough to give him a good, solid sense of what he had to do in order to win approval and affection from others. Because he never was close enough to anyone to develop a good sense of who they were, what pleased them - as well as displeased them - what they thought and felt about things, he did not acquire much sense of common identity with people. He grew up feeling different, cut-off, alienated, and puzzled about what it is that others want, since so many of his attempts to please others were met with disapproval, and rejection. The evidence is that he concluded that he must somehow be unworthy, defective, ultimately rejectable due to his seeming incapacity to get along like other people. At heart, Mr. Summerlin appears to be convinced that he is a "born loser", one of the flotsam-and-jetsam castoffs from society. This is reflected, for example, in his comments about his life having been cast in a pattern that destined him to follow in the footsteps of his criminal father. His early experiences taught him that he could not help but make a mess of things, fail in all his attempts to fit in and do things right, escape the role of helpless victim of circumstances - circumstances born of his own sense of defectiveness and negative destiny.

It is not that Mr. Summerlin has not wanted to fit in, live a decent life, and do things as he sees most other people doing them. He has.

In fact, it is probable that he has struggled mightily against what he feels is the negative side of his personality, the side that continuously presents itself to destroy his relationships, and his life. As he puts it, "It seems like my right side wants to _____, and my left side wants to stay neutral." What he is expressing _____ is the conflict that exists between his need to find warm, positive, loving relationships and his contrary need to defend himself against getting too close to people out of fear of being hurt.

Psychologically, Mr. Summerlin can be viewed as caught between a paranoid view of life and a more conventional, if somewhat depressive, view of life. From the latter point of view, he hungers for affection and approval and periodically enters into relationships that seem to promise this kind of satisfaction, but because he understands people so imperfectly, lacks feeling for what it is that he would do to please them, and is still too full of distrust and defensiveness, he ultimately sabotages every relationship he gets into. From his perspective, however, it seems that he is once again being rejected. His more paranoid notions about people seem vindicated - that is, his feeling that nobody can be trusted, and that he is fool to let anyone know how deeply he feels things, or how intensely he needs. From his paranoid perspective, which becomes more acute each time he suffers another disappointment, he regards any of the more human sentiments as a "weakness", a point of vulnerability that makes him all the more susceptible to the hurts that, in his mind, people are set to do him. He gets particularly paranoid about women, seeing them as selfish, greedy, dishonest, deceptive, and interested in men only for what they can get out of them materially. When he is thinking like this, most women appear to him as whores, and his hostility towards them is great. At other times, he may approach women with an inordinate need to win their approval, and, therefore, goes out of his way to please and satisfy them, particularly as well. In both instances, he appears to be imposing on them the image that he retains from childhood of his mother, a conflicting compound of bitch-goddess-someone deserving of all his hate, yet someone that could cause him to do almost anything to win her love and approval.

His vacillation between conflicting feelings of love and hate is what is responsible for much of the behavior seen in the interview. He catches himself feeling soft, caring, and forgiving, and instantly stops himself, sensing that such sentiments put him in danger. He adopts a very suspicious, distrusting attitude one minute, but the next is caught up by his need to confess and pay penance, and can't seem to settle on one posture for any length of time. He voices suspicions about the kind of defense he is getting, suggesting that he would be better off conducting his own defense, then changes his attitude and comments that he is fearful that he might beat the charges against him and be released. He says that he is tired, depressed, and no longer has any desire to go on living, then shifts to an angry, aggressive, "I'll-never-give-in-to-the-bastards-who-want-to-get-me" kind of stance. At one moment, in paranoid fashion, he is full of outwardly directed hostility, insisting that he is right and justified in his actions and that other people are at fault. The next moment, in depressive fashion, he is full of inwardly directed hostility, coming to the defense of the same people he was earlier criticizing, while keeping all the fault on his.....

[REDACTED INFORMATION]

If his rapidly changing attitudes and moods are disconcerting and upsetting to other people, they are particularly unsettling to him, particularly as they interact with his organically diminished capacity for self-control. Indications are that he has tried to bring some stability into his life by adopting various defensive postures. Since most of his ambivalence is aroused by being in close proximity to other people, his main line of defense has been to keep as much distance as possible between himself and other people. He accomplished this, it appears, by making use of the considerable feelings of rage and hostility that he harbors, exhibiting his aggressive tendencies to people in order to make them feel uncomfortable and held their distance. This was a satisfying defense in that it also helped him to overcome his own feelings of fear, weakness, and inadequacy. It was a troublesome defense in that it did not always work to scare other people off, but, instead to draw him more often than might have been the case otherwise into having to act out on his hostilities. It also worked against his contrary desire to be accepted and approved of by people, and, therefore, at times when his

paranoid feelings had subsided somewhat, he struggled to rid himself o this outward attribute, which, by the time he was a grown man, has come to feel like an inform part of his personality rather than like an acquired defensive habit.

The other major defense he erected against the unstabilizing effects of his ambivalence was, in line with his desire to get his hostility and rage under control, behavioral and emotional constriction. That is, he developed retentive defenses against his explosive tendencies, learning to contain and hide many of his feelings from others. This is what was seen when he became emotionally aroused during the interview. He could be observed trying to brace against the emotions that were building up in him, clinging to whatever stabilizing structure was available, and sucking in air as if he were trying to cool the emotions boiling up within him. He described himself as being a person who usually remained quiet, had little to do or say with other people, and, to the extent he did, as trying to maintain a cool, easy-going manner. The problem with this kind of defense, at least to the extent that Mr. Summerlin ex____ it, is that it causes him to hold everything in until it reaches explosive proportion, setting the stage for some relatively trivial event to come along and trigger the pressures that have been accumulating beneath his quiet facade. With his paranoid view of the world, such trivial events abound in his perception.

In addition to the extreme distrust he exhibited about my identity and purpose of interviewing him, he spoke of feeling himself constantly watched, of suspicions he harbors about his cellmate, whom he thinks may be a spy sent in to get information from him, and his thought that there might be some sinister connection between the fact that his first lawyer left his case to accept a job with a law firm and the first doctor he talked to went on vacation. He also spoke of getting "bad vibes" from many of his fellow inmates, whom he either takes an instant dislike to, or senses that they are spoiling for a fight in order to "try him out for size." He gets so uncomfortable when he feels that other men are looking at him when he is trying to urinate, that his muscles tense up, he cannot urinate, and feels forced to sit down.

[REDACTED INFORMATION]

Although his paranoid attitudes and emotions are plentiful, there was nothing he said or reported to indicate that they have ever reached delusional proportions. He spoke of no plots or bizarre happenings. While he certainly feels persecuted, subjected to critical scrutiny, and subject to various malignant influences, he retains a basically logical attitude about these feelings, and is able to question their validity and to regard them as possibly, even probably, unwarranted in many instances.

His defective sense of identity, extreme ambivalence, great emotional liability, explosive rages, and inability to enter into enduring trusting relationships, all in the absence of any of the more usual symptoms of psychosis, such as delusion, hallucination, and disorganized thinking are consistent with a diagnosis of Borderline personality disorder (DSM III 351.82). The Borderline personality disorder is described as being marked by a profound identity disturbance, great instability in a variety of areas of functioning, such as interpersonal relations, mood, and behavioral _____, which frequently take the form of intense anger, either directed against others or towards one self, or both. Great impulsivity and unpredictability is one of the hallmarks of this disorder. In addition to this primary diagnostic pattern, there are also features associated with a Paranoid personality disorder, and indicators of an organic brain impairment, which is probably responsible for the defendant's developmental reading disorder, and which may very well underlie some of the difficulty he has with keeping his impulses under control.

In my opinion, while Mr. Summerlin's mental condition does not support an argument of legal insanity under the M'Naughton rule, because he is deeply, emotionally and mentally disturbed, unaware of the motives, underline much of his behavior and unable, because of his problems, ____ normal restraint and control, once his highly unstable and volatile emotions are aroused, it should be taken into consideration as a mitigating factor.

[REDACTED INFORMATION]

APPENDIX E

STATE OF ARIZONA -- COUNTY OF MARICOPA -- ADULT PROBATION DEPARTMENT

P.O.: SALLY FALKNER PROB. #

NAME : WARREN WESLEY SUMMERLIN RACE: White SEX M HT 5'9"
RESIDENCE: Main Jail, 120 S. First Ave. EYES: Haz HAIR Bro WT 152
Phoenix, AZ ZIP 85009 DOB: 3-4-47 AGE 35
PHONE 253-7196 MESSAGE PHONE None CITIZEN OF USA
AKA OR MAIDEN None BIRTHPLACE Miami, Fl
ID MARKS None DRIVER'S LIC NO. B62586 AZ
EMPLOYER/ADDRESS/PHONE Unemployed S.S. NO. 263-80-7186
F.B.I. NO. 464-633 F
OCCUPATION Maintenance EDUCATION 7 BOOKING NO. 536478
MARITAL Married RELIGION Protestant CHILDREN None

CURRENT OFFENSE
CAUSE NO. 119502 OFFENSE DATE 4-29-81 NCIC 0949D
CHARGE Murder First Degree, Class 1 Felony
A.R.S. NOS. 1105, 1101, 703, 604
CAUSE NO. 125325 OFFENSE DATE 4-29-81 NCIC 1199D
CHARGE Sexual Assault, Class 2 Felony
A.R.S. NOS. 13-1406, 701, 702, 801

DATE OF ARREST 4-30-81 ARRESTING AGENCY PPD
DATE INCAR. 4-30-81 REL DATE None REL. STATUS Jail
DAYS IN JAIL THIS ARREST 434 REMAND JUVENILE COURT/DATE--NO

DEFENSE COUNSEL George Klink, Ct. Appt. PROSECUTOR Jessica Gifford, A.G.
GUILT BY/DATE Jury 6-8-82 SENTENCING JUDGE: PHILIP W. MARQUARDT
DATE OF SENTENCE 7-8-82
CODEF/DISPOS None

CRIMINAL HISTORY	WARRANTS OUTSTANDING		
	CASE NO.	CHARGE	STATE
NO. CONVICTIONS: FEL 8 MISD 5 JUV 4	_____	_____	_____
NO. INCARCERATIONS: PRISON 2 JAIL 3	_____	_____	_____
ESCAPE 1 OTHER	_____	_____	_____

NO. SUPERVISIONS: PROB. 2 PAROLE 1 OTHER:

GENERAL INFORMATION

NARCOTICS/ALCOHOLHISTORY None
TREATMENT/PROGRAMS None

MILITARY HISTORY: NOT APPLICABLE PROBATION:
BRANCH TYPE DISCH. PROB. TERM. DATE
ENTRY DATE DISCH. DATE TYPE TERM. CLASS 7530

SPOUSE/RELATIVES/CHILDREN

NAME	RELATION	AGE	ADDRESS	PHONE
Virginia Onelo	Mother	59	508 W. Glenwood, Phoenix, AZ	253-7196
Dora Summerlin	Wife	33	3342 W. Willetta, Phoenix, AZ	
Vallery Ammond	Sister		California	

THE STATE OF ARIZONA
Plaintiff

vs.

WARREN WESLEY SUMMERLIN
Defendant

CAUSE NO. 119502 AND 125325

HONORABLE PHILIP W. MARQUARDT

CRIMINAL DIVISION E

SUPERIOR COURT

PRESENTENCE INVESTIGATION

PRESENT CHARGE: Cause No. 119502: Murder, First Degree, a Class 1 and Dangerous Felony.
Cause No. 125325: Sexual Assault, a Class 2 and Dangerous Felony.

JURY VERDICT:
Cause No. 119502 and Cause No. 125325: June 8, 1982.

CUSTODY STATUS:
Cause Nos. 119502 and 125325:

The defendant has been incarcerated in the Maricopa County Jail since April 30, 1981 for a total of 434 days.

DEFENSE COUNSEL: George Klink, court appointed.

PRESENT OFFENSE:

Cause Nos. 119502 and 125325:

The following information is taken from Phoenix Police Departmental Report #81-049673:

On April 30, 1981, at approximately 12:25 p.m., the victim Brenna Jean Bailey, was found dead in the trunk of her 1974 Mustang which was parked in the parking lot west of the Low Cost Market located at 3442 West Van Buren. The victim had a large depressed skull fracture

at the rear of her head. The victim was nude from the mid-chest down. Her clothing was later found on the left rear floorboard of her car.

On the evening of April 29, 1981, the victim had been reported to the police as a missing person after failing to return to her job as a collection agent for Finance America in Tempe. It was determined that one of the stops the victim was to have made during her work day was at the residence of Mr. and Mrs. Warren Summerlin, 3342 West Willetta, in reference to a delinquent payment on a loan.

On the same evening, Silent Witness received a call from an anonymous female who stated that the defendant had murdered a girl from the finance company, rolled her in a blanket, and carted her away after she had been killed.

With the information received, the police obtained a search warrant and conducted a search of the defendant's residence. Investigators found numerous items which indicated the defendant was involved in the death of Brenna Jean Bailey. Based on the accumulated evidence, the defendant was advised of his rights and placed under arrest. Mr. Summerlin was then booked into the Maricopa County Jail and charged with first degree murder.

An indictment followed on May 7, 1981, charging the defendant with first degree murder, a class 1 felony. On June 8, 1982, the defendant was found guilty by jury of murder, first degree.

RELATED OFFENSES:

Cause No. 125325:

On March 16, 1982 an indictment was filed charging the defendant with sexual assault, a class 2 felony. The defendant was also found guilty of this offense in the jury verdict of June 8, 1982.

Due to the jury outcome, two prior felonies are being alleged against the defendant to include two felony convictions in Florida for breaking and entering, one included carrying a concealed weapon.

DEFENDANT'S STATEMENT:

Cause Nos. 119502 and 125325

In the initial presentence interview in December, 1981, the defendant, on the advice of defense counsel refused to answer any of this officer's questions pertaining to the murder of Brenna Jean Bailey. However, the defendant emphasized to this writer that his mother was responsible in identifying his father in a serious crime, as his wife in the present offense.

Even though the defendant refused to answer any questions pertaining to the murder, the police report contained information which suggested that the defendant had violent or aggressive tendencies with may have had a bearing in the present offense. The defendant's wife stated to the investigating officer that her husband had a "quick and severe temper."

This officer asked the defendant about the comment and he remarked that he goes into "violent rages," when feeling threatened or pressured. The defendant further explained that while some people have breakdowns, he reacts by breaking things. As a example, the defendant expressed that if he was unable to fix a TV, he would "throw it against the wall" and would dispose of it by "taking it to the dump."

In a follow-up interview of June 28, 1982, the defendant strongly denied his guilt in the murder and sexual assault of the victim. Mr. Summerlin exhibited no signs of remorse and angrily spoke of the injustice that has been done to him during the court proceedings. The defendant complained that he had been denied an opportunity to take a polygraph test, voiced his displeasure of his legal counsel, and said he hoped the judge would give him the death penalty as it would be an

automatic appeal. Mr. Summerlin further elaborated on his "plan on coming back "through filing various motions and appeals.

STATEMENT OF VICTIMS:

Cause Nos. 119502 and 125325:

For obvious reasons, the victim in this cause could not be contacted, however, the following are statements made by the victim's family concerning sentencing.

Mr. Vernon Cox, the victim's father, recommends that the defendant be sentenced at least to maximum consecutive sentences without parole for the brutal beating, sexual assault and murder of his daughter. The victim's mother also recommends that the defendant be sentenced to maximum time available.

The victim's boyfriend, Marvin Rigsby, recommends that the defendant receive the death penalty.

Attached to the presentence report are numerous letters and petitions written and signed by the victim's family and friends concerning the sentencing in this case.

STATEMENT OF REFERENCES AND INTERESTED PARTIES:

George Klink, court appointed attorney, recommends that the defendant be given a life sentence on the murder and the minimum prison sentence on the sexual assault. Mr. Klink is of the opinion that the defendant has no control over his actions. He further related that in spite of the jury verdict, he does not believe a rape was committed and therefore, asks for a minimum sentence.

Assistant Attorney General, Jessica Gifford, urges the court to recommend the death penalty for the murder conviction. She bases her recommendation on two aggravating circumstances; One, the crime was committed in a cruel, heinous and depraved manner. And two, the

defendant has previously been convicted of a crime involving the use of violence against another person. Ms. Gifford recommends the maximum consecutive sentence on the sexual assault basing it on the infliction of serious physical and mental injury, the use or threatened use of dangerous instrument, the defendant's prison record, and the fact that the defendant was on probation at the time of the offense.

Phoenix Police Detective Davis recommends that the defendant be sentenced to the maximum time the court will allow.

Sergeant Midcaff, of the Phoenix Police Department, recommends life imprisonment as he said there is no doubt in his mind that the victim was raped and that this was the motive for the killing.

Detective Klettinger, of the Phoenix Police Department, recommends that because the defendant is a detriment to society and would most likely repeat homicidal acts, that he be incarcerated for the maximum available penalty.

The defendant's wife, Doris Summerlin, recommends that if imprisoned, the defendant receive psychiatric assistance. She believes that jail alone will not rehabilitate him.

PRIOR RECORD

JUVENILE:

The defendant has an extensive juvenile record. He as first placed in Kenall (a Florida juvenile institution) for four months in 1961 for breaking and entering a residence. In April, 1962, the defendant was committed to the Florida State School for Boys for two more counts of breaking and entering. The defendant indicated he has numerous other arrests for incorrigibility and truancy.

ADULT:

ARREST DATE	PLACE OF ARREST	CRIME/DISPOSITION
4-7-64	Hialeah, FL	Petty larceny/15 days suspended. $15.00 or 1 day.
12-20-65	Miami, FL	B and E, grand larceny/ Dismissed grand larceny, 3 years probation on charge of B and 3.
9-17-67	Miami, FL	Vagrancy/Time served..
4-16-68	Hialeah, FL	Disorderly conduct/Bail forfeited
5-21-68	Omaha, NE	Dyer act-interstate transportation of stolen vehicle/8-16-68 released to federal prison-3 years.
9-30-71	Miami, FL	Auto Theft, possession stolen property/Charge dismissed-Nolle Prosse.
12-7-71	Miami, FL	Vagrancy/2 days.
12-24-71	Miami, FL	Burglary, grand larceny, carrying firearms, possession of stolen property/7 years prison concurrent sentences.

5-28-75	Lake Butler, FL	Escape/Returned D.O.C.
7-12-79	Phoenix, AZ	Armed Robbery, first degree, felony/Convicted burglary, third degree, class 5 felony, 3 years probation.
3-21-81	Phoenix, AZ	Aggravated assault, criminal damage/Count I, 20 years A.S.P., count II, 4.5 years A.S.P. to run concurrently.
4-20-81	Phoenix, AZ	Possession of marijuana/Dismissed.
4-30-81	Phoenix, AZ	Murder, first degree, sexual assault, second degree/Present offense.

This officer would like to point out to the court that the previous plea agreement in cause number CR107996 was made with the understanding the defendant had no prior felony convictions. The defendant maintained throughout the previous presentence investigation he had no prior record.

SOCIAL HISTORY:

The defendant was the first of two children born to Warren Ray and Virginia Summerlin on February 4, 1947, in Miami, Florida. During the defendant's early childhood, his father served fifteen years on a life sentence for armed robbery. His father was later shot to death in 1975, a suspect in an armed robbery.

The defendant's parents were divorced during the father's imprisonment, and the mother later remarried. Previous reports

indicated that the defendant's mother was considered an alcoholic who never provided any training or guidance for the defendant. The defendant's file reflects that his mother would have one man after another living with her most of the time.

The defendant stated that when he was seven years old, he began running away from home and getting into trouble. This writer calls attention to the psychological report done by Dr. Donald Tatro where the defendant recalled that his mother "was always beating me." The defendant claimed to have liked it better in juvenile detention that he did at home. For further information regarding the defendant's childhood, please refer to the attached psychological report done by Dr. Tatro.

The defendant stated that he dropped out of school in the seventh grade due to a learning disability. He further related that he suffers from dyslexia and consequently is illiterate.

The defendant has been married on two occasions. The first marriage in 1965 to Lenore Summerlin ended in divorce after one year. No children were born of this marriage. The defendant stated his reason for divorce was due to his belief that his wife was being unfaithful. The defendant revealed he was married for the second time shortly after his move to Arizona in 1978 or 1979. The defendant has three stepchildren from his wife's previous marriage. The defendant related no marital problems to this writer, however, in the psychological report done by Dr. Tatro, he said that his wife's tendencies to tell him lies has led them almost to the point of separation. The defendant described his wife as a "traitor" for having informed on him to police.

The defendant states he has no military experience.

Over the past five years the defendant's employment has consisted of construction or custodial positions. Prior to this instant offense, he said he was self employed in the capacity of a household maintenance man. If work was steady, the defendant related he could make $250.00

per week. The defendant advised this officer he has a certificate in welding.

The defendant reported that due to an automobile accident in 1980, he sustained neck and back injuries. He further related he has been treated by county doctors and has received chiropractic adjustments for the injuries. Because of these injuries, the defendant commented he still suffers headaches and has been restricted in his work. The defendant informed this w iter he is currently involved in civil litigation in Maricopa County concerning the accident. On June 28, 1982, the defendant informed this writer that he lost the suit involving his earlier car accident.

The defendant denies any alcohol or drug abuse.

The defendant reported that he first saw a psychiatrist at the age of six at his mother's request. The defendant believes that the reason he was seeing the counselor was due to his learning difficulties in school. The defendant advised this writer that while serving time in Florida, a doctor diagnosed that he ws [sic] a paranoid schizophrenic. In 1975 the defendant stated that he was prescribed thorzaine in order to "mellow out." The defendant related that his only sister is in a mental institution in California due to several suicide attempts. Attached for the court's perusal are two psychological reports attesting to the defendant's mental capabilities.

DISCUSSION AND EVALUATION:

Before the court for sentencing is a thirty-five-year-old, Caucasian male who has been found guilty by jury of first degree murder and sexual assault. At the time of the present offense, the defendant was on probation for count 1, burglary, third degree, a class 5 felony.

The defendant refused to discuss his involvement in the sexual assault or murder and failed to acknowledge his guilt. Throughout the interviews, the defendant exhibited no signs of remorse for his victim, only angrily speaking of the injustice done to him throughout the court

proceedings. The only reference the defendant made about the offense was to his wife following his arrest. The defendant stated that this was the "big crime" and that it was bound to happen sooner or later.

The instant offense was a senseless and brutal attack of an innocent young woman whose only mistake, if any, was being in the wrong place at the wrong time. What mentel [sic] terror and trauma the victim felt throughout her ordeal, will never be known, however, any reasonable individual can assume it was beyond comprehension. Her attempts to struggle for her life ended as the defendant viciously and repeatedly beat her head with a blunt instrument.

The defendant has an extensive juvenile and adult record which has resulted in two previous prison sentences. The defendant has been institutionalized the majority of his life, beginning at age seven.

Past and present offenses confirm the psychological appraisal of the defendant harboring his hostilities and resentments against women and then manifesting them by committing such crimes as he did, an earlier aggravated attack on a woman and in the ultimate action, took the life of a woman.

The defendant's personality appears to be ingrained with deceitfulness. He denied any prior record in the presentence investigation done in the burglary conviction in 1979. That prior record came to light after he was arrested in the murder of Brenna Bailey. The prior record reveals that in the majority of crimes he has been involved in, he has carried a deadly weapon. The defendant's obsession with deadly weapons is revealed in a past statement that he always carries a "machete, ugly stick, ax handle and knife," in his car.

There is no doubt that the defendant's upbringing has played a part in how he acts and behaves. However, his upbringing cannot be used as a justification in taking a human life.

If there is any mitigating factor in this situation, it is that the defendant has shown learning ability in that he was able to obtain a

welding certificate and that he was able to maintain employment over the past five years.

This writer is of the opinion the defendant represents a grave threat not only to women, but to all of society. This writer further believes that the taking of a human life is the ultimate crime and in the manner in which it occurred, the defendant should be dealt the most severe penalty possible.

In making the recommendation below, the following factors were considered:

1. The violation upon and the taking of a human life.
2. The defendant's prior record, including his history of imprisonment.
3. The defendant's complete lack of remorse.
4. The threat the defendant constitutes to the community.
5. The statement and recommendations that the victim's family and interested parties made.
6. The psychological evaluation prepared by Dr. Tatro.
7. The defendant's refusal to discuss the death of the victim.
8. The defendant was on probation at the time the offense occurred.
9 The defendant's poor upbringing.
10. The defendant's ability to learn despite his illiteracy.
11. The defendant's previous work history.

RECOMMENDATION:

Cause No. 119502:

It is respectfully recommended that the defendant be sentenced as prescribed by law.

Cause No. 125325:

It is respectfully recommended that the defendant be incarcerated in the Arizona State Prison for a term in excess of the presumptive up

to the maximum allowed. The defendant has been in custody 434 days as of the date of sentencing.

It is further respectfully recommended that these sentences be served consecutively with one and other.

RESTITUTION/REIMBURSEMENT:

Due to the above recommendation, restitution or reimbursement is not applicable in this cause.

Respectfully submitted,

H. C. Duffie
Chief Probation Officer

I have reviewed and considered the probation officer's report.

By: s/_____
Sally A. Falkner
Deputy Adult Probation Officer
262-3681

RECEIVED
PHILIP W. MARQUARDT

Judge:_____
Date: JUL 7 1982
JUDGE OF THE SUPERIOR COURT

SAF:al:7643D
June 30, 1982

No. 05-903

IN THE

Supreme Court of the United States

DORA B. SCHRIRO, *et al.*,

Petitioners,

v.

WARREN WESLEY SUMMERLIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

JON M. SANDS
Federal Public Defender
KEN MURRAY*
LETICIA MARQUEZ
Office of the Federal Public
Defender for the District of Arizona
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816

* *Counsel of Record* *Counsel for Respondent*

200227

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Did the court of appeals properly apply the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), when it concluded that Respondent was prejudiced by his trial counsel's failure to investigate and present significant and readily available mitigating evidence?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cited Authorities

STATEMENT OF THE CASE

Respondent Warren Summerlin respectfully directs this Court to, and incorporates by reference and adopts herein, the detailed recitation of the underlying facts and procedural history set forth in *Summerlin v. Schriro* ("*Summerlin II*"), 427 F.3d 623 (9th Cir. 2005) (en banc) (App. A at A-1 to A-38) (adopting the underlying factual and procedural history as chronicled in its prior decision),[1] and *Summerlin v. Stewart* ("*Summerlin I*"), 341 F.3d 1082 (9th Cir. 2003) (en banc).

REASONS FOR DENYING THE PETITION

Petitioners do not argue that the challenged decision of the court of appeals is in conflict with any decision of either a federal court of appeals or a state court of last resort. *See* Sup. Ct. R. 10. Petitioners do not argue that the court of appeals erred in its analysis of deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984), when it concluded that trial counsel's performance at sentencing fell below prevailing professional norms. *See Strickland*, 466 U.S. at 688. Rather, Petitioners advocate for a unique application of *Strickland* in cases like this where the trial judge was the factfinder both at sentencing and at the post-conviction hearing. Petition for Writ of Certiorari at 4. Their primary argument is that *Strickland* should allow for a novel standard that mandates an "especially heightened deference" to the state court's finding that no prejudice was established

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1. Petitioners attached as Appendix A to their Petition for Certiorari a copy of the opinion below. Reference to Appendix A will be to "App. A at __." In the copy received by Respondent, App. A at A-2 is missing. That is the page, referenced above, on which the court of appeals adopts its previous statement of the facts and procedural posture of the case.

in situations in which the trial judge has had occasion to reaffirm his prior ruling regarding the sentence imposed in a capital case. The practical effect of applying Petitioners' "especially heightened deference" standard here would be total acquiescence by a federal habeas court in a state court's ruling on a *Strickland* claim.

This Court should not grant a writ of certiorari for two reasons. First, Petitioners never asked any lower court to adopt or apply the proposed "especially heightened deference" standard. Consequently, no lower court has addressed, adopted, or rejected the proposed standard. Second, the facts and circumstances of this case offer no compelling justification for changing the prejudice analysis of this Court's ineffective-assistance-of-counsel jurisprudence. The *Strickland* standard for analyzing the prejudice prong of any ineffective-assistance-of-counsel claim is an adequate standard and was properly applied by the court of appeals. Respondents have not stated an important constitutional question of national importance that requires this Court's resolution.

1. Petitioners have not previously sought to apply the proposed "especially heightened deference" standard in the court below.

Generally, this Court will not consider claims that were not raised in or considered by the courts below. *See Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253-54 (1999) (per curiam). The Court ordinarily only departs from this rule in "unusual circumstances" in which injustice may result if the particular question is not considered. *Berkemer v. McCarty*, 468 U.S. 420, 443 n.38 (1984); *see also Connor v. Finch*, 431 U.S. 407, 421 n.19 (1977). But when the "complex

nature" of a claim and "its broad implications suggest that its consideration by the lower courts would help its resolution," this Court generally declines to address an issue not raised in the lower courts. *Baldwin v. Reese*, 541 U.S. 27, 34 (2004).

Petitioners urge this Court to adopt a standard not previously announced in *Strickland* or its progeny. Specifically, Petitioners argue for a vague "especially heightened deference" standard for the analysis under *Strickland*'s prejudice prong. Petitioners argue that the unusual facts of this case justify a sweeping revision of *Strickland*'s prejudice prong—that in situations where the trial judge was factfinder both at sentencing and in post-conviction proceedings, federal courts should absolutely defer to the state trial court's resolution of the prejudice prong of a *Strickland* claim. Petition at 5. Moreover, Petitioners assert that a finding of *Strickland* prejudice is a factual finding that should be "essentially unchallengeable" on habeas review when the trial judge himself has reaffirmed his sentencing decision. Petition at 4-5.

The parties have not had the opportunity to litigate the facts relied on by Petitioners in the context of their novel legal standard. Petitioners argue that during the post-conviction proceedings the trial judge had before him all the mitigating evidence that trial counsel should have presented at sentencing. Respondent submits that their position misstates the facts and has no support in the record. In fact, Respondent offered additional mitigating evidence in the federal courts that the trial judge should have heard but did not. Accordingly, Petitioners' effort to secure "especially heightened deference" for the trial judge's prejudice determination is inappropriate. Petition at 4.

Certainly, this Court's preference for avoiding issues not presented in the lower courts is not inflexible. "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941) (citing *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220, 225 (1927)). But the particular factual situation presented here does not typify the exceptional circumstance that would lead this Court to review an issue neither raised nor addressed by the lower courts.

2. This case offers no compelling justification for changing this Court's ineffective-assistance-of-counsel jurisprudence regarding the prejudice analysis under *Strickland*.

In *Strickland*, this Court established standards for addressing claims of ineffective assistance of counsel at capital trials and for determining whether any such deficient performance was prejudicial to the defendant. The analytic process set forth in *Strickland* has been repeatedly reviewed and affirmed by this Court. *See Rompilla v. Beard*, 545 U.S. __, 125 S. Ct. 2456, 2469 (2005) ("[T]oday's decision simply applies our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland* . . . .") (O'Connor, J., concurring); *Wiggins v. Smith*, 539 U.S. 510, 521-23 (2003) (reiterating that *Strickland* is the metric by which to judge claims of ineffective assistance of counsel); *Williams (Terry) v. Taylor*, 529 U.S. 362, 391-95 (2000) (discussing the *Strickland* analysis in detail). This case presents no compelling reason to depart from precedent that rests on such a solid foundation.

In an attempt to distinguish *Williams*, *Wiggins*, and *Rompilla*, Petitioners rely on the fact that in this case, the same judge who was the factfinder at sentencing also heard additional mitigation evidence in a post-conviction hearing. Petitioners further submit that the trial judge's ruling during the state post-conviction proceedings obviates the need for a prejudice analysis in federal habeas proceedings.

> There is no need to speculate as to what the trier-of-fact would have done if presented with the evidence Summerlin developed in the post-conviction proceeding. We know exactly what the trier-of-fact would have done because the trial judge ruled that the evidence would not have changed the sentence *he* imposed.

Petition at 5. Respondent disagrees both with Petitioners' factual assumptions and with the legal claim based on those assumptions. Petitioners assert that the trial judge subsequently heard all the mitigation evidence that trial counsel should have presented. This misstatement finds no support in the record. Thus, even if this Court were inclined to revisit *Strickland*, this case is not an appropriate vehicle for doing so.

A. The court of appeals applied the correct standard of review to Respondent's claim.

A state court's conclusion under *Strickland*'s prejudice prong is not, as Petitioners would have it, "essentially a factual finding." Petition at 5. To be sure, subsidiary factual determinations are subject to the deference requirement of the habeas statute. *See Strickland*, 466 U.S. at 698. But "both the performance and prejudice components of the

ineffectiveness inquiry are mixed questions of law and fact" that an appellate court reviews *de novo*. *Id.*; *see also Summerlin II*, App. A at A-8 (citing *Rios v. Rocha*, 299 F.3d 796, 799 n.4 (9th Cir. 2002)).

This Court has consistently assumed that "fact-intensive, mixed questions of constitutional law" require "independent review" in order to "maintain control of, and to clarify, the legal principles governing the factual circumstances necessary to satisfy the protections of the Bill of Rights." *Lilly v. Virginia*, 527 U.S. 116, 136 (1999) (quoting *Ornelas v. United States*, 517 U.S. 690, 697 (1996)). This Court reviews such claims *de novo*, and Petitioners have advanced no persuasive reason for applying a different standard of review.

Strickland requires that a defendant seeking relief on a claim of ineffective assistance of counsel must establish both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. In *Strickland*, this Court explained that a "defendant need not show that counsel's deficient conduct more likely than not altered the outcome" of the case to establish prejudice. *Id.* at 693. Instead, a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. This Court defined a reasonable probability in this context as meaning a probability "sufficient to undermine confidence in the outcome." *Id.*

In granting Respondent relief based on trial counsel's deficient performance and the resultant prejudice, the court of appeals correctly identified and applied the standard enunciated by this Court in *Strickland* and its progeny.

The court of appeals first acknowledged that, under pre-AEDPA[2] law, it must consider a claim of ineffective assistance of counsel as a mixed question of law and fact to be reviewed *de novo*. *Summerlin II*, App. A at A-8. This standard of review comports with the holding in *Strickland*. *See Strickland*, 466 U.S. at 698 (noting that whether counsel rendered ineffective assistance is a mixed question of law and fact). Next, the court in *Summerlin II* correctly acknowledged that it must presume state-court factual findings to be correct unless they are not fairly supported by the record. *Summerlin II*, App. A at A-8.

The court of appeals conducted a thorough and detailed analysis of both the deficient-performance and prejudice prongs of Respondent's claim of ineffective assistance of counsel. The court found that counsel failed to investigate and present readily available mitigating evidence, including psychosocial mental health issues and mitigating evidence regarding the aggravated assault conviction that served as an aggravating factor. *Summerlin II*, App. A at A-11 to A-18, A-30; *cf. also Rompilla*, 125 S. Ct. at 2465; *Wiggins*, 539 U.S. at 524. As a result of these failures, the court of appeals concluded that Respondent was prejudiced. *Summerlin II*, App. A at A-29 to A-34.

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2. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1217-21 (codified at 28 U.S.C. §§ 2244, 2253-2255). The AEDPA does not apply to this case because the initial petition was filed before April 24, 1996, the AEDPA's effective date. *See Summerlin I*, 341 F.3d at 1092 (citing *Lindh v. Murphy*, 521 U.S. 320, 327 (1997)).